SUPREME COURT OF THE UNITED STATES

No.—— Original

October Term, 1922.

STATE OF GEORGIA,

Plaintiff

Vs.

THE CITY OF CHATTANOOGA, TENNESSEE,

Defendant.

MOTION FOR LEAVE TO FILE ORIGINAL BILL AND FOR A PRELIMINARY INJUNCTION.

Now comes the State of Georgia, by its Attorney General, George M. Napier, and moves the court for leave to file the bill of complaint herewith exhibited, in a suit between said State of Georgia and the City of Chattanooga, Tennessee, a municipal corporation of the State of Tennessee and a citizen of that State, wherein Plaintiff seeks to enjoin Defendant from appropriating, for street purposes, certain land constituting a part of the terminal faciltities of a railroad which, by permission of the State of Tennessee, it owns in that State, and that a restraining order or temporary injunction issue as prayed in said bill.

STATE OF GEORGIA,
By George M. Napier,
Attorney General.

Robert H. Williams,
William L. Frierson,
Joe V. Williams.
Counsel.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF GEORGIA,
Plaintiff,

Vs.

THE CITY OF CHATTANOOGA, TENNESSEE,
Defendant.

I.

Plaintiff respectfully shows the court that it is one of the States of the United States and that the defendant is a municipal corporation organized and existing under the laws of the State of Tennessee, and a citizen of that State.

II.

Plaintiff, through its Governor and Attorney General, brings this suit and invokes the jurisdiction of this honorable Court to have determined a controversy which has arisen between it and the defendant. Plaintiff constructed many years ago a railroad extending from its capital city of Atlanta into the state of Tennessee and the city of Chattanooga in said state, and known as the Western & Atlantic Railroad, and now owns the same, together with certain real estate in said city, on which are located its yards and other terminal facilities. These lands were acquired in 1852. Chattanooga was then a small town and the lands

were located in its outskirts and were of little value. Since then the town has grown until it and its suburbs have a population of between 75,000 and 100,000 and its corporate limits have been extended until said lands are now near the business center and are worth many hundred thousand dollars.

The defendant municipal corporation, under a claim to the right of eminent domain, has assumed, by ordinance, to establish and open a street through Plaintiff's said yards and has instructed its city attorney to institute preceedings to condemn Plaintiff's property for a right of way for said street.

While Plaintiff acquired and holds said real estate by permission of the Legislature of Tennessee, it has never consented to being sued in the courts of that state nor to submit to their jurisdiction in any controversy that may arise between it and the state of Tennessee or citizens of that state. For the reasons hereinafter shown, it denies the right of the defendant to take its said property for the right of way for a street and it invokes the jurisdiction of this Court to determine the controversy and prevent it from being disturbed in the rightful possession and use of its property.

III.

Plaintiff shows that, as early as 1837, as a part of a plan for internal improvements, it under-

took the building of said railroad which was completed and has been in operation for its full length since about 1851. Said railroad has had an important relation to the development of a railroad system throughout the southern states. It now not only furnishes railroad competition between Atlanta and Chattanooga but, through connections at these two cities, furnishes competition for through traffic from the South Atlantic and Gulf coasts to all points in the North and East.

Plaintiff shows that it built its Western & Atlantic Railroad as a public enterprise and paid for it out of its own funds. It has never incorporated said railroad but has retained the ownership in itself in its soverign and corporate capacity. The Western & Atlantic Railroad is merely the name by which it has designated this part of its property.

IV.

In 1837, there had been but little railroad building in the southern states. Plaintiff's project appealed to the interest of the people of Tennessee almost as much as to that of its own people. Railroad connection with the navigation on the Tennessee River, as well as with railroads built and to be built in Tennessee, was of great importance to both states. Hence when Plaintiff, in its soverign and corporate capacity, applied to the Legislature of Tennessee for permission to ex-

tend its railroad into Tennessee, and for the loan of that state's power of eminent domain, to the extent that such power might be necessary to locate its railroad and acquire right of way and other real estate needed for railroad purposes, the request was readily granted upon the sole condition that Plantiff would, when desired, deal in the same way with the State of Tennessee or Tennessee corporations.

Accordingly, on January 24th, 1837, the Legislature of Tennessee passed an act, the three sections of which enacted are as follows:

> 1. That the State of Georgia shall be allowed the privilege of making necessary recognizance and survey for the purpose of ascertaining the most eligible route for the extension of her Western & Atlantic railroad, from the Georgia line to some point on the eastern margin of the Tennessee River.
>
> 2. That as soon as said route and point shall be ascertained, the State of of Georgia shall be allowed the right of way for the extension and construction of her said railroad from the Georgia line to the Tennessee River, and that she shall be entitled to all privileges, rights and immunities (except the subscription on the part of Tennessee) and be subject to the same restrictions as far as they are applicable,

as are granted, made and prescribed for the benefit, government and direction of the Hiawassee railroad Company.

3. That the foregoing rights and privileges are conferred upon the State of Georgia on condition that whenever application is made, she will grant and concede similar ones and to as great an extent, to the State of Tennessee, or her incoporated companies.

The Hiawassee Railroad Company had previously been chartered by an act of the Legislature which, after constituting the company a body politic, with the usual general powers of a corporation, prescribed the privileges, rights, and immunities which the company should have, exercise and enjoy in respect to the construction and operation of its railroad, including the right to acquire, by purchase or condemnation, necessary real estate, and prescribing the manner in which the right of eminent domain should be exercised.

The Hiawassee was one of the first railroad charters granted by the State of Tennessee. But, by an act passed December 11th, 1845, the legislature chartered another railroad company, under the name of Nashville & Chattanooga Railroad Company, and prescribed somewhat more fully and satisfactorily the rights, privileges, and

immunities which the company, after being organized with the usual general powers of a corporation, should have, exercise, and enjoy in respect to its railroad.

Plaintiff had not then completed the building of its Western and Atlantic Railroad. And in order that, in respect to said railroad, Plaintiff, in the sovereign and corporate capacity it then had, might go into Tennessee and have conferred on it the same rights as that state had conferred on corporations chartered to build and operate railroads, the Tennessee Legislature passed another Act on February 3rd, 1848, which enacted as follows:

> That all the rights, privileges and immunities, with the same restrictions which are given and granted to the Nashville Chattanooga Railroad Company by the Act of the General Assembly of this state, incorporating said company, passed December 11th, 1845, are, so far as they are applicable, hereby given to and conferred upon the State of Georgia, to be enjoyed and exercised by that state in the construction of that part of the Western & Atlantic Railroad, lying in Hamilton County, Tennessee, and in the management of its business.

Thus it will be seen that the Legislature of Tennessee did not attempt to exact, as a condition to

the enjoyment of the rights granted, that Plaintiff should become subject to the jurisdiction of the Tennessee courts. It simply agreed that a sovereign state, which could not be sued without its consent, might, in the building and operation of a railroad, exercise the same rights and privileges which it had seen fit to permit corporations of its own creation to exercise.

That plaintiff had not subjected itself to be sued in the courts of Tennessee was fully understood and, after Plaintiff began the operation of its railroad, became a matter of concern to the Legislature of Tennessee.

When the Western & Atlantic Railroad was completed, it was operated for a good many years by Plaintiff directly through officers and employes selected for that purpose. Of course, in the operation of a railroad by a state, there will be wrongs and injuries just as when operated by a corporation. But Plaintiff, in this new venture, was not, at first, willing to forego its sovereign immunity from suit and there was no means of redressing such wrongs except by an appeal to the Legislature of Georgia.

In this situation, the Legislature of Tennessee set about inducing Plaintiff to agree to some arrangement whereby wrongs and injuries occurring in the operation of its railroad might be adequately redressed. Accordingly, in 1851, the Legislature of Tennessee addressed a lengthy memorial to the Legislature of Georgia calling

attention to these unsatisfactory conditions. This memorial recognized fully Plaintiff's right to refrain from giving its consent to be sued but sought, in the interest of friendly intercourse, to secure an agreement that would relieve existing conditions. It recited that the rights, powers, privileges, and immunities conferred by the Act of 1838 in connection with said Western & Atlantic Railroad were conferred on the express condition that similar powers, rights, privileges and immunities, should, on application, be conceded by Plaintiff to the state of Tennessee or her incorporated companies, and that this pledge had been faithfully redeemed. Attention was then called to the fact that for the redress of wrongs resulting from the operation of a railroad by a corporation there was a plain and easy remedy, and the memorial proceeded:

> Not so in the case of the Western and Atlantic railroad. This is exclusively the property of your state. Its property and rights are vested in a sovereignty, and consequently exempt from the liabilities that attach to individuals or companies of incorporation. Should damages result to citizens of your state, or ours, or any of our sister states, what remedy, what redress, have we or they now, but such as a sense of justice of the Legislature may accord them, and which, if obtained,

> must be done with much delay and great expense? Difficulties enough in many instances to amount to a denial of justice, in consequence of the inconvenience of making the application to the only source of redress, the legislative power of your state.
>
> May we not, therefore, ask that you will take such action as your sense of justice and fairness may suggest?—such as will place all the interests involved on a footing of equality—such as will secure a faithful administration of your road, quiet all apprehensions, and give confidence and efficiency to our great enterprises.

Upon considering this memorial, Plaintiff was willing to furnish in its own courts a means of redressing wrongs committed in the operation of its railroad but it was unwilling, in such matters, to subject itself to suits in the courts of a sister State. Hence in 1852, its Legislature enacted a law relating to the Western & Atlantic Railroad as follows:

> All suits against the road must be brought against the superintendent in his offcial capacity in the County of Fulton where the office of said road is located, except in those cases of claims where by the law other roads are allowed to be sued elsewhere; but under

> no circumstances are suits against such road to be allowed against such road, its officers, or agents, in the state of Tennessee, beyond the right, if any, that may exist under the authority granted to this state to extend said road into Tennessee.

And in 1862, Plaintiff consented to be governed, in the operation of its railroad, by the same laws and rules of liability which it made applicable to corporations operating railroads in that state, by enacting a statute which was later carried into its Code of 1910 as follows:

> All laws of force regulating the liability of railroad companies in this State, for damage done by the running of locomotives, cars and other machinery, are hereby declared to apply equally to the Western & Atlantic Railroad; and in the bringing of all suits against the Western & Atlantic Railroad, the same shall be regulated by the laws in existence on that subject at the time of the adoption of this Code.

These laws have never been repealed or modified. Plaintiff has consented to be governed by its own laws applicable to railroads and to be sued in its own courts. But it has not consented to be sued in Tennessee. On the contrary, it has expressly refused to so consent.

However, as the business of its railroad grew, Plaintiff realized that the operation of said road under these conditions would be likely to lead to friction between it and a sister state. And, for this and other reasons, about 1870 it adopted, and has ever since followed, the policy of leasing its railroad to be operated by a corporation which is subject to suit like any other corporation, but Plaintiff still owns the railroad.

It follows that, without its consent, Plaintiff can not be sued or its right to said property litigated in any court. It is unwilling and, in fact, anxious that its rights shall be judicially determined but, availing itself of the jurisdiction of this court, it is unwilling to give, by consent, jurisdiction to any other court. And hence this court has exclusive jurisdiction of the existing controversy between Plaintiff and Defendant.

V.

Plaintiff now shows the Court that, after the passage of said Act of 1838 it located its railroad so as to extend from the state line to a point in Hamilton County on the Tennessee River in what was then the village of Ross' Landing and is now the City of Chattanooga.

In 1839, the town of Chattanooga was incorporated. Its area included the whole of a quarter section known as the north-east quarter of Section 29. This quarter section was bounded by the south bank of the Tennessee River and the

southerly boundary line of said quarter section was made the southerly boundary of the new town. The act incorporating said town provided that its area should be divided into "such lots, streets, lanes and alleys as have been or may hereafter be laid off by commissioners appointed by the proprietors of said land for that purpose."

Previously the owners of said quarter section had caused it to be laid off into lots and streets, an dthese streets thus became the streets of that part of the town of Chattanooga. Either then or later the streets running north and south were given names and those running east and west were designated by numbers, beginning with First Street near the river and continuing south by consecutive numbers to Tenth Street.

The principal street was Market Street, running north and south. Next to it on the west and parallel with it, was Mulberry Street (the name afterwards was changed to Railroad Avenue and finally to Broad Street). And next to it on the west was Chestnut Street. These streets all began at the river and extended south to the corporate line. But this line ran northwest and southeast. Hence the result was that Chestnut Street ended slightly beyond Ninth Street; Broad Street crossed Ninth Street and extended about 150 feet beyond; and Market Street extended to Tenth Street

There was thus within the corporate limits south of Ninth Street a triangular strip bounded

on the north by Ninth Street, and on the east by Market Street, and on the third side by the corporate line running from Market & Tenth Streets to Ninth and Chestnut Streets, with Mulberry (now Broad) Street dividing it into two parts. It had been platted along with the rest of said quarter section. The part of it east of Broad Street was divided into three lots designated as lots 65 and 67 and fractional lot 69 on Market Street. The part west of Broad Street was divided into two lots designated as fractional lots 66 and 68 on Chestnut Street.

One of the objects of extending the Western & Atlantic Railroad into Tennessee being to connect with navigation on the Tennessee River, it was deemed important both to Plaintiff and to the public that it extend to the banks of the river. To accomplish this, the city council, on July 21st, 1840, passed an ordinance widening Mulberry Street from Ninth Street to the river from sixty feet to one hundred and twenty six feet, changing its name to Railroad Avenue, and granting to Plaintiff, for the use of the Western & Atlantic Railroad, the right to use it for railroad purposes. Accordingly when Plaintiff, some years later completed its railroad, its tracks were laid in what is now Broad Street from Ninth Street to the river.

It was also necessary for Plaintiff to acquire land needed for passenger and freight stations, switch yards and other terminal facilities. About

this time the Nashville & Chattanooga Railroad was building its road from Nashville to Chattanooga and Plaintiff deemed it wise to join that company in providing a passenger station for their joint use. The lands lying south of Ninth Street between Market & Chestnut Streets were selected as being suitable for the location of a joint passenger station, separate freight stations, and separate switch yards.

Accordingly Plaintiff, in 1852 purchased from the owners the five lots above described as lying in the triangular strip just south of Ninth Street, and Plaintiff and the Nashville & Chattanooga Railroad Company purchased the thirty-five acres adjoining said triangular strip on the south, Plaintiff taking a part of the eastern portion and the Nashville and Chattanooga Railroad Company taking the rest. In the meantime, the owners of this 35 acres had, in 1848, divided it into blocks bounded by streets and, in 1851, the corporate limits had been extended so as to include it, but, as a part of the trade, the owners agreed to the closing of all these streets and the City acquiesced.

The Nashville & Chattanooga Railroad built its freight station at the corner of Ninth and Chestnut Streets. The joint passenger station was built just east of this, partly on the land of the Plaintiff and partly on that of the Nashville & Chattanooga Railroad Company. Plaintiff built its freight station and platforms at the corner

of Ninth and Market Streets. And, on the land between this and the joint passenger station, it built its switch yards. The few feet of Broad Street south of Ninth Street as platted had never been improved as a street and it became a part of Plaintiff's switch yards being occupied by tracks just as the land on either side.

Plaintiff's main line coming into Chattanooga crosses Market Street about 1400 feet south of Ninth Street and runs in a northwesterly direction along the edge of Plaintiff's switch yard into the joint passenger station. The land which it acquired and still holds for switch yards and other terminal facilities, therefore is bounded on the north by Ninth Street; on the east by Market Street; on the south by Plaintiff's main line; and on the west by the joint passenger station; and contains about 11 acres.

Thus all the land fronting on the south side of Ninth Street between Market and Chestnut Streets was acquired and used for the purposes of said two railroads and was thus devoted to a public use.

VI.

Plaintiff further shows that for seceral years after the completion of its said railroad, it operated the tracks which had been laid in Railroad Avenue (now Broad Street) from Ninth Street to the river for the purpose of transporting freight. But, in 1860, the city council, claiming

that the Plaintiff had virtually abandoned the use of that part of its road between Sixth Street and the river, passed an ordinance repealing the ordinance of 1840 and instructing the city marshal to tear up Plaintiff's tracks in said street. To enjoin this action, Plaintiff filed a bill in the Chancery Court of Hamilton County, Tennessee. Through the loss of the papers during the Civil War this suit did not come to trial. But, in 1867, another ordinance was passed, again repealing the ordinance of 1840 and directing the marshal to tear up the tracks. Plaintiff filed another injunction bill and the suit was finally determined by the Supreme Court of Tennessee in 1878 against Plaintiff, the court saying:

> We are of the opinion that the complainant has abandoned the use of the street in question for the purpose for which the grant was intended; it no longer uses its right of way for the purpose of running its road to the Tennessee river. This was the right which was granted by the state and as it was used for this purpose the city agreed to the use of this street; it was not contemplated that in the event that the terminus of the road and its depot should be put at the point now located, this street should be used for the purpose now used; having abandoned the use of the street for the purpose for

which the privilege was granted the exclusive right to the street reverts to the city.

In the meantime, there had arisen another controversy between Plaintiff and the city. Plaintiff had acquired a triangular piece of land fronting on the east side of Market Street between Tenth and Eleventh Streets. In 1867, the city council passed an ordinance opening a street, known as Georgia Avenue, through this land. At that time, the city's charter authorized it to condemn land by appointing commissioners to assess the damages. Commissioners were appointd and, in 1873, made their report which was approved by the City Council. In the meantime, Plaintiff had leased its railroad and Chattanooga property to the Western & Atlantic Railroad Company, a Georgia corporation. And, on April 15th, 1873, it joined the Western and Atlantic Railroad Company in filing a bill in the Chancery Court at Chattanooga, to enjoin the appropriation of its land for the purpose of said street. This was pending undetermined when the Supreme Court of Tennessee rendered the decision above mentioned which resulted in the removal of Plaintiff's tracks from Ninth Street to the river. That decision, however, did not determine Plaintiff's right to that small part of Broad Street, as originally platted, which was south of Ninth Street and had, as before shown, become a part of Plaintiff's switch yards. The city had never, by formal action,

abandoned it but it had been in the adverse and exclusive possession of Plaintiff and occupied by its tracks since 1851. It was, therefore, desirable that all questions that might arise as to the respective rights of Plaintiff and the city should be definitely settled. As the result of negotiations, Plaintiff agreed to yield to the city the right of way for Georgia Avenue on condition that its right to that part of Broad Street which was south of Ninth Street should be forever quieted. To accomplish this, the city council passed an ordinance, known as No. 256, closing and abandoning that part of Broad Street south of Ninth Street on condition that the suit to enjoin the opening of Georgia Avenue be dismissed and that "complainants shall enter into written obligation not to begin any new suit or suits as to said right of way so long as the Mayor and Aldermen shall not disturb said Railroad Company in its peaceable use and occupation of that part of said avenue for the purpose of laying tracks and use of the same closed and abandoned by this ordinance." Said ordinance also contained this proviso:

> Provided, that the Mayor and Aldermen of the City of Chattanooga reserve the right at any time when the peaceable possession and use of said right of way of said Georgia Avenue from said Griffin to Market Street shall be disturbed or resisted by any party or person to reassert and enforce

all rights to a street as now laid out in that part of Railroad Avenue lying south of Ninth Street which said Mayor & Aldermen may have had before the passage of this ordinance.

After its passage some opposition developed to this ordinance and fourteen days later the city council (then known as the Board of Mayor & Aldermen) passed another ordinance known as No. 258 by which, without referring to ordinance No. 256, it undertook to provide for the joint use of that part of Broad Street south of Ninth Street by the city and railroad.

This was, of course, unsatisfactory to Plaintiff and further negotiations followed which resulted in an agreement to carry out the original settlement but only after the city had exacted of Plaintiff's lessee, the Western & Atlantic Railroad Company, an agreement to transfer and assign to the city its lease (which would expire in 1890) of said triangle of land through which Georgia Avenue was to be opened. And, on January 28, 1879, an ordinance was passed repealing said ordinance 258 and re-enacting ordinance 256. The obligation required by said ordinance 256 was promptly executed and, in addition, Plaintiff's lessee, the Western & Atlantic Railroad Company, transferred to the city its unexpired lease on said triangle of land fronting on the east side of Market Street.

Thereupon, on January 29th, 1879, Plaintiff's injunction suit was dismissed by a consent decree which set out in full said ordinance No. 256 and continued as follows:

> Complainant by counsel accepts the terms and conditions of said ordinance with its benefits, rights, and advantages and obligations, and by consent it is therefore, ordered, adjudged and decreed by the court that Complainant be perpetually enjoined from beginning any new suit or suits as to the right of way of said defendant over that part of Georgia Avenue lying between Griffin (sometimes called Tenth Street) and Market Street in said city so long as the defendant shall not disturb compainant in the peaceable use, occupation and enjoyment of that part of Railroad Avenue in said city which lies south of the south side of Ninth Street, and that this cause be and is hereby dismissed at the cost of complainants.

Thus that part of Broad Street which had never been improved as a street and which had been, in fact, abandoned ever since about 1851 when Plaintiff built its railroad, was now formally abandoned and whatever rights the city had reverted to Plaintiff as the owner of the lots on both sides of it. And that portion of said street has

continuously ever since been in the possession of Plaintiff and its lessees.

VII.

During the time that Plaintiff operated its said railroad, it maintained its freight station at the corner of Market and Ninth Streets and its switch yards and tracks above described occupied all the space between that station and the joint passenger station, being separated from Ninth Street only by a fence. Plaintiff owned no other terminal facilities in Chattanooga and these yards were absolutely necessary for the operation of its property.

In 1870, Plaintiff leased its said railroad to the Western and Atlantic Railroad Company for a period of twenty years and the same was operated by that company until 1890. During this period Plaintiff's land lying south of Ninth Street constituted the only terminal facilities which said company had in Chattanooga and was continuously used in the operation of said railroad in the same way that Plaintiff had previously used it.

In 1890 Plaintiff leased its said railroad and Chattanooga property to the Nashville, Chattanooga & St. Louis Railway (formerly the Nashville & Chattanooga Railroad Company) and at the expiration of that lease, again leased it to the same company and, under this second lease, said railroad is now, and will be until December 1969, operated by that company.

VIII.

As the City of Chattanooga grew, the territory south of Plaintiff's yards was built up and much of it occupied for business purposes so that said yards are now near the business center. The increasing traffic over Market and Ninth Streets rendered it undesirable both to the public and the company operating the railroad to have switch yards thus located, separated from busy streets only by a fence. Plaintiff's lessees, therefore, adopted the policy of leasing a narrow strip extending along Market and Ninth Streets to private parties for the erection of buildings for business purposes. This strip on Ninth Street is 60 feet wide and, for the entire distance between the old freight station and a building occupied by an express company and adjoining the joint passenger station, is occupied by small houses used for various business purposes. These buildings serve to cut off from the street the view of the switch yards.

IX.

Plaintiff now shows the court that since the Nashville, Chattanooga & St. Louis Railway Company has been its lessee, that company has not found it necessary to do all the ordinary switching incident to the operation of the Western & Atlantic Railroad in Plaintiff's said yards. That company has operated Plaintiff's railroad in con-

nection with its own to form a through line from Nashville to Atlanta. It has sought to operate both properties in Chattanooga in the manner most convenient to itself and most advantageous to the public. In a city like Chattanooga a railroad must have not only extensive trackage for the switching operations incident to making up and breaking up trains, but there must also be tracks on which cars may be stored when not in actual use or when awaiting repairs and team tracks conveniently located for loading and unloading freight cars. Plaintiff's said lessee found its Western & Atlantic yards admirably located for team tracks. It also found that, by relieving its own yards of its storage and team tracks it could do most of the switching incident to the operation of both roads in those yards, and that by locating its team tracks in the Western & Atlantic yards it could most efficiently serve the public convenience. Hence it has done most of the ordinary switching in its own yards and has used Plaintiff's yards for the other purposes above mentioned. This, of course, necessitated some change in the arrangement of the tracks in Plaintiff's yards. Team tracks are necessary to the service which a railroad renders to the public. They cannot be used unless access to them by wagons or trucks is provided. The land used to provide this access is as much devoted to public use as the land occupied by the tracks. Plaintiff's said lessee long ago selected two tracks near

Minnesota State Library,
St. Paul, Minn.

the center of said yard and running from Plaintiff's main line near its intersection with Market Street back through said yards toward Ninth Street, to be used as team tracks. It then so rearranged the tracks as to leave sufficient space for the convenient passage of trucks and wagons hauling freight from and to cars. And between these tracks it has made a smooth roadway. There are now in said yards twelve tracks. One runs immediately in the rear of the row of buildings along Market Street and is used to deliver freight to those buildings. Between this and the team tracks are four others and between the team tracks and the passenger station are five others, all of which are in use for the storage of cars and for minor switching operations.

Plaintiff shows further that in the development of traffic by rail the express business has become an important adjunct to and a part of railroad business. It has thus become necessary in connection with all large passenger terminals to provide space for express companies without which that part of the railroad business can not be expeditiously and efficiently handled. Accordingly many years ago there was erected on Plaintiff's land adjoining the passenger station on the east, a building which has ever since been occupied and used by an express company. As the city and the business of the express company grew the handling of all its freight through a Ninth Street entrance became a source of an-

noyance both to the public and to the company, and Plaintiff's lessee has, therefore, permitted the express company to have access from Market Street to the rear of its building for its wagons and trucks over the roadway between the two team tracks.

Some years ago the volume of the express company's business became so great that the building it then occupied was inadequate. To meet its growing needs, another building was erected on Plaintiff's said land in the rear of and connected with the building then occupied by the express company. This building, with the platforms used in connection with it, is 75 1-3 feet south of Ninth Street and extends east and west 127 feet and north and south 65 feet. Enough of the tracks immediately south of it have been taken up to provide sufficient open space for the safe and convenient movement of wagons and trucks loading and unloading freight. The remainder of said yards is still occupied by tracks as above shown.

It is thus shown that the land occupied by the passenger station, and the two buildings and ground used by the express company, constitute Plaintiff's passenger and express terminals and is devoted to the public use of a railroad. The remainder of said yards is occupied by tracks as shown and Plaintiff's freight station at the corner of Market and Ninth Streets has been con-

verted into a city ticket office and is used by the lessee for that purpose.

During the past several years there has been, at intervals, agitation in Chattanooga for the extension of Broad Street through Plaintiff's said yards and across the tracks of other railroads lying south of Plaintiff's property so as to make that street a thoroughfare from the river to the southern part of the city. But, while the City of Chattanooga is given by its charter the right to condemn land for widening or extending its streets, the power so granted is limited to the condemnation of such lands as are by the general laws of the state made subject to the right of eminent domain and to such proceedings for that purpose as are authorized by those laws. And the general laws of the state, as will be more fully shown, do not authorize any corporation upon which the right of eminent domain has been conferred to condemn either land which the state has permitted a sister state to acquire or land which has been previously devoted to another public purpose. Not only is it true that any such power is omitted from Defendant's charter but the attention of the Legislature has repeatedly been called to Plaintiff's said yards and application made for the passage of an act which would enable the city to open a street through them, and each time, after hearings before a committee and full consideration, the application has been refused. The Legislature has

thus expressed the deliberate purpose that Defendant shall not have the power to disturb the use of these yards as they are now used by opening streets through them, either because it was considered that such action would be an act of bad faith toward a sister state or likely to disturb the friendly relations with that state or because the public interest was regarded as being better served by the existing yards than by the opening of streets through them.

XII.

Notwithstanding its want of power or right, Defendant's City Council, on September 26th, 1922, passed an ordinance, copy of which is made a part hereof as Exhibit "A", by which it assumed to establish a street, to be an extension of Broad Street, diagonally through Plaintiff's said yards from Ninth Street to Market Street where the latter street intersects Plaintiff's main line.

The proposed street will be wholly on land owned by Plaintiff but said ordinance makes no reference to Plaintiff's ownership, but describes said street as extending through "the railroad yards of the Nashville, Chattanooga & St. Louis Railway Company" which it, in turn, describes as including both the lands held under lease from Plaintiff and the adjoining lands owned by that Company.

While said ordinance recites the importance of an additional means of communication between the northern and southern portions of the city, the proposed street will not provide such a means of communication. It will only cut off a corner of a block in the northern part of the city and all traffic over it will be brought into Market Street at the railroad crossing which divides the city into two parts. There will thus be no diversion of any part of the present traffic except for a distance of about 1,400 feet on Market Street.

It is proposed to make a street beginning at Ninth Street with a width of sixty-nine feet. The east line is to extend a distance of 480 feet and the west line 520 feet. These lines terminate respectively at the west rail of one of the team tracks and the east rail of the other team track. From these points it is proposed to follow the curving lines of these two rails and thus to appropriate the private roadway which Plaintiff's lessee has provided between its two team tracks and which is necessary for the use of said tracks. Said roadway is at the beginning about 29 feet wide and gradually narrows until at Market Street it is only about 23 1-4 feet wide. A map showing said yards and the proposed street is made a part hereof as Exhibit "B".

XIII.

Plaintiff further shows that if said street is laid out as proposed it will extend from Ninth

Street a distance of 60 feet over land on which the buildings fronting on Ninth Street now stand.

It will then extend, at a width of 69 feet through the building and platforms erected and now used for handling the express business of Plaintiff's lessee, and the same, together with the necessary open space adjoining it, will be totally destroyed for this public use.

Said street will then appropriate and entirely destroy one of said team tracks for a distance of 270 feet and the other team track for a distance of 150 feet.

It is then proposed to take said private roadway and convert it into a public street including all the space between the rails on either side thereof. This would materially impair, if not entirely destroy, the use of said two tracks as team tracks. Such tracks cannot be conveniently used unless the railroad furnishes space, under its control, where wagons and trucks may stand while loading and unloading. Plaintiff's lessee has provided this roadway as a necessary place in which to conduct that part of its public business which consists of loading and unloading freight cars. The use of it as a public street, under the control of the city authorities, is wholly incompatible with and will destroy this use. With a street extending to the rail of each of these team tracks, cars cannot be placed on

either of them without trespassing on the street. The use of this narrow roadway as a public street for general traffic will be entirely inconsistent with and will not only materially impair but actually destroy its present equally public use in connection with said team tracks.

Plaintiff, therefore, shows that the right of way which Defendant seeks to appropriate for said street is over lands which, as its lessee is now using them, are devoted to a public use and are not subject to condemnation as proposed. Even though it might be possible for Plaintiff's lessees to operate the Western & Atlantic Railroad in connection with its own railroad without using these yards, the fact remains that they are being used by it for public railroad purposes. And moreover, they constitute an essential part of Plaintiff's railroad, and will always be necessary even for ordinary switching purposes when said railroad is operated either by it or by a lessee without terminal facilities of its own.

The Western & Atlantic Railroad consists, in the main, of a railroad from Atlantic to Chattanooga and facilities for serving the public and handling its business in those two cities. The value of its terminal facilities in the two cities is not much less than the value of the rest of the road. The opening of the street, as proposed, through said yards will utterly destroy them as switch yards and thus destroy the integrity of said

Western & Atlantic property as a railroad. At the expiration of the present lease or, at its earlier termination, Plaintiff would be without the necessary means to operate its railroad in Chattanooga and, in its efforts to secure a new lessee, Plaintiff would find that only a lessee, having its own terminal facilities, could afford to lease said railroad and such lessee could, to a large extent, dictate its own terms.

XIV.

Plaintiff now shows that the State of Tennessee has not conferred upon the Defendant the right to condemn either property which it has permitted Plaintiff to acquire, or property already devoted to a public use.

As shown above, the charter of defendant gives it only such rights with respect to the condemnation of property as are conferred by the general laws of the state upon corporations to which the Legislature has extended the right of eminent domain.

The general law on this subject was enacted as a part of the Code adopted by the State of Tennessee in 1858, after Plaintiff had been permitted to acquire its said property in Chattanooga. It authorized persons or corporations to whom the right of eminent domain was extended to "take the real estate of *individuals.*"

In 1885 this right was enlarged so as to in-

clude the "taking of the property, privileges, rights, or casements of *private corporations*." But the state has never conferred upon any person or corporation the right to take property which it had permitted a sister state to acquire for any purpose, and when Defendant has asked for the right to take Plaintiff's property, the Legislature has refused.

Moreover, under the laws of Tennessee, the general power to condemn land for street purposes does not authorize the taking of property which is already devoted to a public purpose. And, for the reasons stated, Plaintiff charges that Defendant is without lawful authority to take and appropriate a right of way for a street through its said yards.

Plaintiff, therefore, charges that Defendant has no right or power to condemn and appropriate any part of the proposed right of way for said street, in the case of that small portion which will extend through land occupied by buildings used for private business, for the reason that said land was acquired by Plaintiff, a sovereign state, by permission of the State of Tennessee, and the Legislature of that state has not conferred upon defendant the power to condemn it without regard to the use to which it may be put, and, in the case of the rest of said right of way, for the same reason and the additional reason that the land sought to be appropriated is ac-

tually devoted to another public use which is incompatible with its use as a street. And to open said street as proposed will result in irreparable damage to Plaintiff.

XV

Complainant now shows that, pursuant to said ordinance, the Defendant, on November 29th, 1922, through its city attorney, filed a petition in the Circuit Court of Hamilton County Tennessee, asking for a jury of view, and seeking the judgment of that court condemning said right of way and assessing the damages. To this petition Plaintiff's lessee, the Nashville, Chattanooga and St. Louis Railway Company and those to whom that company has leased ground or buildings fronting on Ninth Street are made defendants and process has issued to be served on them. Plaintiff is also named as a defendant and alleged to be the owner of the property And Defendant has caused publication to be made for Plaintiff on the theory that it is a non-resident of the State of Tennessee. Said publication purports to require Plaintiff to appear and make defense to said petition on or before January 1st, 1923, on penalty of having judgment by default entered against it. But, since, as before shown, Plaintiff has never consented to be sued in said court, it cannot, in this way, be forced to submit to the jurisdiction of that court and to waive its right to have the controversy between

it and Defendant determined by this Court. And Plaintiff contends that service by publication upon a sovereign State is unauthorized and illegal. And, in order to protect the jurisdiction of this Court which under the circumstances, is exclusive, it is necessary that Defendant be enjoined from prosecuting said proceedings in the Circuit Court of Hamilton County or from interfering with Plaintiff or its lessee in the possession and use of said property.

XVI.

Premises considered, Plaintiff prays that it be permitted to file this bill; that a subpoena issue requiring Defendant to appear and answer thereto but not on oath, which is waived. On the hearing, let it be decreed that Plaintiff's land which the Defendant seeks to appropriate as the right of way for a street is not subject to condemnation by Defendant for that purpose, and let Defendant be enjoined from prosecuting said proceeding in the Circuit Court of Hamilton County, Tennessee, or from interfering with plaintiff or its lessee in the possession and use of said property.

And, in the meantime, let a restraining order or temporary injunction issue to restrain further steps or efforts to appropriate said right of way until the controversy herein presented may be determined.

Grant such other, further, and general relief as Plaintiff may be entitled to.

This is the first application for an injunction in this cause.

STATE OF GEORGIA,
By George M. Napier,
Attorney General.

Robert H. Williams,
William L. Frierson,
Joe V. Williams,
Counsel.

STATE OF GEORGIA,
FULTON COUNTY.

I, George M. Napier, being duly sworn, depose and say that I am the Attorney General of the State of Georgia; that I have read the foregoing bill of complaint and know its contents; that so far as the same are allegations of fact made as of my own knowledge they are true; that so far as they relate to occurrances of many years ago and are necessarily made on information and belief, they are believed to be true.

GEO. M. NAPIER.

Subscribed and sworn
to before me this 5th
day of December, 1922.

T. R. GRESS,
Notary Public.
State at Large, Atlanta, Ga.
(SEAL)

EXHIBIT A

AN ORDINANCE TO EXTEND BROAD STREET FROM ITS PRESENT TERMINUS AT WEST NINTH STREET TO THE INTERSECTION OF MARKET STREET WITH THE W. & A. CROSSING; TO AUTHORIZE THE CONDEMNATION OF CERTAIN PROPERTY FOR THIS PURPOSE; AND TO ESTABLISH A STREET IN THE PROPERTY CONDEMNED.

WHEREAS, the railroad yards of the Nashville, Chattanooga & St. Louis Railway Company extend into the heart of the business section of the City of Chattanooga, and are bounded on the north by West Ninth Street, on the east by Market Street, on the south by the group of buildings in the angle formed by West Thirteenth and Cowart Streets, and on the west by Chestnut Street; and there are no streets through said yard, and,

WHEREAS, this condition results in the separation of the large jobbing and retail districts lying to the east and west of said railway yards, and these two sections have only the one means of communication, to-wit: west Ninth Street, which street lies in the heart of the retail district of the City, and,

WHEREAS, the important retail section of the City lying on Whiteside Street, on Main Street East of Whiteside Street, and on Rossville Ave-

nue, and the other important retail sections of the City lying on Market Street from the river south to West Ninth Street, and on the cross streets from First to Ninth Streets inclusive, have but the one means of communication, to-wit: Market Street. BY REASON WHEREOF, and by reason of many other things, the Board of Commissioners of the City Chattanooga deem it necessary to extend Broad Street from its present south terminus to the intersection of Market Street and the W. & A. Crossing, NOW THEREFORE:

SECTION 1. BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF CHATTANOOGA that a street is hereby established from the south line of West Ninth Street, where said Ninth Street intersects with Broad Street, to the intersection of Market Street with the W. & A. Crossing, all within the boundaries of the City of Chattanooga, said street hereby established to be bounded as follows:

EAST LINE: Beginning at a point in the South line of West Ninth Street, 11.6 feet westwardly from the intersection of West Ninth Street and the east curb line of Broad Street, if extended southwardly; running thence southwardly parallel with Market Street, 480 feet to the present location of the west rail of the switch track of the Nashville, Chattanooga & St. Louis Railway, known as Track No. 6; thence south-

wardly with said present location of said west rail, to its intersection with Market Street.

WEST LINE: Beginning at a point in the south line of West Ninth Street, 69 feet west of the beginning point for the "east line," as above described; thence parallel with Market Street, southwardly, 520 feet to a point in the south line of Eleventh Street, if extended; thence eastwardly along said South line of Eleventh Street, if extended, to the east rail of switch track No. 8; and thence southwardly with said east rail to the intersection of Market Street.

SECTION 2. BE IT FURTHER ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF CHATTANOOGA, that the City Attorney be, and he is hereby authorized and directed to institute and prosecute to final conclusion, condemnation proceedings in the name of the City of Chattanooga, for the purpose of condemning the property lying within the boundaries of said street, as set out in Section 1 hereof; or such part thereof as the City may be authorized to condemn; and the Commissioner of Streets and Sewers is hereby authorized and directed to pay to the owners of said property, or other parties having an interest therein, as their interest may appear, or to the Clerk of the Circuit Court, for their use, the amount of damages to be assessed, or to execute a bond in the name of the City for the payment of said damages, as may be required by law.

SECTION 3. BE IT FURTHER ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF CHATTANOOGA that the Commissioner of Streets and Sewers be, and he is hereby, authorized and directed, as soon as he is authorized to do so under the orders of the Court, or otherwise, to extend said Broad Street from the present south line of West Ninth Street, as hereinbefore designated, along and throughout the boundaries of said street, as heretofore set out in Section 1 hereof.

SECTION 4. BE IT FURTHER ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF CHATTANOOGA that this Ordinance take effect two weeks after its passage, the public welfare requiring it.

E. D. BASS, Commissioner of Streets and Sewers.

Passed third and final reading

this September 26, 1922.

Alex W. Chambliss, Mayor.

E. D. Bass, Commissioner.

I, J. Allen Head, Auditor of the City of Chattanooga, Tenn., and as such the keeper of the records of the Board of Commissioners of the City of Chattanooga, Tenn., do hereby certify this to be a true and correct copy of Ordinance

No. 1704, passed by the Board of Commissioners of the City of Chattanooga, Tenn., on the 26th day of September, 1922.

Witness my hand and official seal this the 5th of October, 1922.

J. ALLEN HEAD,

Auditor of the City of Chattanooga, Tenn.

N. C. & St. L. RAILWAY
W. & A. RAILROAD
PASSENGER AND FREIGHT TERMINALS
CHATTANOOGA, TENN.

SHOWING PROPOSED EXTENSION OF BROAD ST.

OCT 1922

OFFICE OF CHIEF ENGINEER

0 FEET 100 200 300 400

SCALE

Exhibit "B".

KING STREET
NEWBY STREET
COLUMBIA ST.
MARKET STREET
CHESTNUT STREET
(BOYCE)
(HOOKE)
(MONTGOMERY)
MAIN
WHITESIDE
WILLIAMS
COWART
LONG ST.
CEDAR ST.
UNION STREET
W. 9TH
W. 10TH
W. 11TH
W. 13TH
RAVENS ST.
FOUNDRY STREET
ALABAMA
ELYRIA
HOTEL STREET
To Rossville
To Atlanta
YARDS
RAILWAY
SOUTHERN
Q. & C. FREIGHT HOUSE
CENTRAL OF GEORGIA RY
FREIGHT HOUSE
Concourse
TERMINAL STATION
HOTEL
HOTEL PATTEN
ANNEX HOTEL
EASTERN HOTEL
Stores
Express
Team Yard
Train Shed
UNION DEPOT
FREIGHT HOUSE N.C.&St.L.
Property Line
MAIN LINE N.C.&St.L.
MAIN LINE W.&A.
CHATTANOOGA SASH & DOOR CO.
ATLANTIC COAL & ICE CO.
SWEETEN MILLS
FLOUR MILL
GEORGIA AVE
ALABAMA GREAT SOUTHERN RAILROAD YARDS

No. 21, Original

Office Supreme Court, U.
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WM. R. STANSB
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IN THE

Supreme Court of the United States

October Term, 1922

State of Georgia

vs.

City of Chattanooga, Tennessee.

BRIEF FOR DEFENDANT.

SAM E. WHITAKER,
City Attorney

SIZER, CHAMBLISS & CHAMBLISS,
Of Counsel.

Register-Republic, Chattanooga, Tenn.

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No. 26 Original

IN THE

Supreme Court of the United States

October Term, 1922

State of Georgia

vs.

City of Chattanooga, Tennessee.

BRIEF FOR DEFENDANT.

STATEMENT OF THE CASE

I.

This is a suit to enjoin proceedings instituted by the defendant City in the Circuit Court for Hamilton County, Tennessee to condemn for street purposes the land of the plaintiff State of Georgia lying within the boundary of the defendant City, and for a decree that plaintiff's land is not subject to condemnation for this purpose.

The bill alleges that on November 29, 1922, the defendant City filed proceedings in the Circuit Court for Hamilton County, Tennessee to condemn a certain right-of-way for a street through plaintiff's land. These

lands, it is alleged, were acquired by the plaintiff in 1852 for use in connection with the operation of the Western & Atlantic Railroad which was owned by the plaintiff State of Georgia. It is alleged that the plaintiff for a long time prior and up to 1870 operated this railroad itself. In 1870 it leased it to the Western & Atlantic Railroad Company, and in 1890 leased it to the Nashville, Chattanooga & St. Louis Railway, which lease was renewed at its expiration, the renewal to expire in 1969. It is alleged that the property is now being used by said last lessee for railroad purposes. Being so used, and such use being for a public purpose, it is alleged that no power exists in the defendant City under the laws of Tennessee to condemn it for street purposes, or for any other public use inconsistent with the present use of it, and it is alleged that the use for which it is now sought to be condemned would be inconsistent with the former use and would materially impair or totally destroy the former use. The jurisdiction of this Court is invoked, however, upon the theory that the plaintiff is a sovereign State and, therefore, is not subject to be sued in any Court except by its consent, and it alleges it has not consented to be sued in the courts of Tennessee but does consent that this Court should assume jurisdiction of the controversy, and it in fact "invokes the jurisdiction of this Court to determine the controversy and prevent it from being disturbed in the rightful use of its property." Finally it is said that the defendant City has undertaken to bring the plaintiff State of Georgia into the Circuit Court for Hamilton County, Tennessee by causing "publication to be made for plaintiff on the theory that it is a non-resident of the State of Tennessee," and it is alleged that such "publication upon a sovereign State is unauthorized and illegal."

II.

By way of showing that it has never consented to be sued in the courts of the State of Tennessee, the bill shows that the plaintiff acquired its property after having "applied to the Legislature of Tennessee for permission to extend its railroad into Tennessee and for the loan of that State's power of eminent domain" for that purpose, and in pursuance of an Act of the Legislature of the State of Tennessee, acting upon said application, passed January 24, 1837, which is set out in the bill. The second section of that Act grants permission to the plaintiff to acquire a right-of-way for its railroad and it is provided "that she shall be entitled to all the privileges, rights and immunities (except the subscription on the part of Tennessee) and be subject to the same restrictions as far as they are applicable, as are granted, made and prescribed for the benefit, government and direction of the Hiawassee Railroad Company." The bill then shows that the Hiawassee Railroad Company had been constituted a body politic "with the usual general powers of a corporation" and that the Legislature had "prescribed the privileges, rights and immunities which the company should have" in the construction of its railroad, including the right of eminent domain. The allegation of the bill is that "the company had the usual general powers of a corporation." These general powers are not specified, but since "the usual general powers of a corporation" always include the right to sue and be sued, it is assumed that the allegations of the bill are sufficient to show that the Hiawassee Railroad had the right to sue and also was subject to suit. Moreover, since the general powers of this corporation are incorporated in an Act of the State of Tennessee it is assumed that the Court will take judicial knowledge of the provisions of the Act, and for this reason the first sec-

tion of the charter of the Hiawassee Railroad Company, which contains "the usual general powers" referred to, and which it will be noted includes the power and liability to "sue and be sued," "plead and be impleaded," is here set out in full:

> "Section 1. Be it enacted by the General Assembly of the State of Tennessee, That William Park et al. be and are hereby appointed commissioners, under a direction of a majority of whom subscriptions may be received to the capital stock of the Hiawassee Railroad Company, hereby incorporated, which commissioners, together with such other person as now are or may hereafter become associated with them, their successors and assigns, shall constitute a body corporate, and they are hereby incorporated under the name aforesaid, and in that name they shall have perpetual succession, may sue and be sued, plead and be impleaded, and shall possess and enjoy all the rights, privileges and immunities, with power to make such by-laws, ordinances, rules and regulations, not inconsistent with the laws of this State and the United States, as shall be necessary to the well ordering and conducting the affairs of said company; and may by their by-laws, declare vacant the place of any director for non-attendance or neglect of duty; and the said company shall be capable in law of purchasing, accepting, selling, leasing and conveying estates, real, personal and mixed, to the end and for the purpose of facilitating the intercourse and transportation from Knoxville, East Tennessee, through the Hiawassee District to a point on the Southern boundary of Tennessee, to be designated by the commissioners hereinafter mentioned as the most practical route to intersect the contemplated railroad from Augusta to Memphis."

By way of further showing that the State had never consented to be sued in the courts of the State of Ten-

nessee, the bill sets out another Act passed by the Legislature of Tennessee on February 3, 1848, in which it was provided "that all the rights, privileges and immunities, with the same restrictions, which are given and granted to the Nashville & Chattanooga Railway Co. * * * are, so far as they are applicable hereto, given to and conferred upon the State of Georgia, to be enjoyed and exercised by that State in the construction of that part of the Western & Atlantic Railroad lying in Hamilton County, Tennessee, and in the management of its business." The charter of the Nashville & Chattaooga Railway Co. is not set out but since this charter was granted by an Act of the State of Tennessee, it is assumed the Court will take judicial knowledge of its terms and accordingly the first section of that Act, which, it will be noted, subjects the railroad company to suit, is here set out:

> "Be it enacted by the General Assembly of the State of Tennessee, That for the purpose of establishing a communication by railroad between Nashville and Chattanooga, the formation of a company is hereby authorized which, when formed, shall be a body corporate by the name and style 'The Nashville and Chattanooga Railroad Company,' and by said corporate name shall be capable in law to buy, receive by gift, hold, sell and convey real and personal estate, as hereinafter provided, make contracts, sue and be sued, to make by-laws and to do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of the business for which it is incorporated, and to have and use a common seal, and the same to alter or destroy at its pleasure, and shall have perpetual succession of members."

Finally on this point, it is alleged that the Legislature of the State of Tennessee in 1851, recognizing that the State of Georgia was not subject to suit in connection

with the operation of its railroad, addressed a memorial to the Legislature of the State of Georgia asking that the situation be remedied; and that upon receipt of this memorial the Legislature of the State of Georgia in 1852 passed an Act providing that suit might be brought against the roads in the County of Fulton, in the State of Georgia, "but under no circumstances are suits against such roads to be allowed against such roads, its officers or agents, in the State of Tennessee, beyond the right, if any, that may exist under the authority granted to this State to extend said road into Tennessee." In other words, this memorial and this Act of the Legislature refusing to consent to suit within the Courts of the State of Tennessee to any greater extent than it had already done by acquiring the land under the permission granted by the State of Tennessee, are cited to show that the State had not consented to suit in the Courts within the State of Tennessee.

III.

Taking up the other branch of the case, that its property was already devoted to a public use and, therefore, defendant City had no right to condemn it for another inconsistent public use, the bill shows that one part of the property which it is sought to condemn is used by its lessee as a switch track for storage of cars and a team track, where cars are placed for loading and unloading. It is alleged that the roadway between these team tracks, which the bill alleges the defendant City seeks to condemn, is necessary for plaintiff's use of these team tracks and that the appropriation of this roadway for street purposes would materially impair and totally destroy its use in connection with the loading and unloading of cars on the team track.

Another part of the property sought to be condemned, the bill alleges, is now being used in the carrying on of the business of an Express Company, to which the plaintiff, or its lessee, has leased a certain part of the ground. The use of this land by the Express Company is alleged to be a use of the land for railroad purposes, for which the land was acquired by the plaintiff, and, therefore, that it cannot be appropriated by the defendant City for another inconsistent public use, and it is alleged that the appropriation of this land for street purposes would be inconsistent with the use of it for express purposes.

The remaining portion of the land, it is alleged, has been sub-leased to private parties for the erection of buildings for business purposes. As to this part of the property the allegation is made (whether to show that it is being used for a public purpose or not, it can't be said), "these buildings serve to cut off from the street the view of the switch yards."

Both for the reason that the property is already devoted to a public use and for the reason that the property belongs to one of the sovereign States of the United States, it is alleged that the defendant City has no power to condemn it for street purposes.

QUESTIONS INVOLVED

The motion to dismiss raises the following points of law:

1. The Court is without jurisdiction to entertain the bill because the original jurisdiction of this Court of suits between a State and a citizen of another State extends only to cases in which the State sues or is sued in

its sovereign capacity and not to cases in which it sues or is sued as a private or quasi-public corporation, and the bill shows on its face that the plaintiff owns the lands, which it is alleged the defendant seeks to condemn, not as a sovereign but as a private or quasi-public corporation.

2. The Court is further without jurisdiction to entertain the bill by virtue of the provisions of the Eleventh Amendment to the Constitution of the United States, which reads as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens of any foreign State."

3. This Court is further without jurisdiction to entertain the bill because the courts of Tennessee, having jurisdiction of petitions for condemnation of all lands over which the sovereignty of the State of Tennessee extends, and the bill showing on its face that the sovereignty of the State of Tennessee extends over the lands of the plaintiff in controversy, and the jurisdiction of one of the Courts of the State of Tennessee having been invoked by the defendant, under the power delegated to it by the State of Tennessee, prior to the filing of the bill in this cause, this Court is without power to enjoin it from proceeding therein, and itself assume jurisdiction of the controversy.

4. This Court is further without jurisdiction to entertain the bill and grant the relief sought, because the bill shows on its face that the State of Tennessee granted permission to the State of Georgia to acquire lands within the limits of its sovereignty, to be used in the opera-

tion of the Western & Atlantic Railroad, subject to the express condition that the State of Georgia should be liable to suit on the same terms that two certain railroad companies incorporated under the laws of the State of Tennessee were subject to suit, and the courts of Tennessee, having jurisdiction of a proceeding to condemn the lands of said companies, had jurisdiction of the petition to condemn the lands of the plaintiff, and their jurisdiction having been invoked by the defendant under the power delegated to it by the State of Tennessee, prior to the filing of the bill in this cause, this Court is without power to enjoin defendant from proceeding with said suit in the State Court and itself assume jurisdiction of the controversy.

5. This Court is further without jurisdiction to entertain the bill which seeks to enjoin a proceeding in the Circuit Court for Hamilton County, Tennessee, by virtue of the provisions of Section 720 of the Revised Statutes of the United States, which reads as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

6. This Court is further without jurisdiction to entertain the bill and grant the relief sought because the bill does not show that the defenses set up therein to the petition for condemnation filed by the defendant against the plaintiff cannot be fully made and adequate relief obtained in the Circuit Court for Hamilton County, Tennessee, where said petition has been filed, and this Court is, therefore, without power to enjoin said suit at law.

BRIEF

I.

The Court is without jurisdiction to entertain the bill because the original jurisdiction of this Court of suits between a State and a Citizen of another State extends only to cases in which the State sues or is sued in its sovereign capacity and not to cases in which it sues or is sued as a private or quasi-public corporation, and the bill shows on its face that the plaintiff owns the lands, which it is alleged the defendant seeks to condemn, not as a sovereign but as a private or quasi-public corporation. This ground of the motion is abandoned.

State of Pennsylvania v. Wheeling etc. Bridge Co. 13 Howard, 518.

II.

The Third and Fourth Grounds of the Motion to Dismiss are based upon the theory that the courts of Tennessee had jurisdiction to entertain the petition for condemnation and, that jurisdiction having been invoked, this Court is without power to enjoin the proceedings in the State Court.

Harkrader v. Wadley, 172 U. S. 148, 164; and cases there cited;
Wallace v. McConnell, 13 Pet. 136;
Chittenden v. Brewster, 2 Wall. 191;
Orton v. Smith, 18 How. 263;
Freeman v. Howe, 24 Howard, 450;
Peck v. Jennis, 7 Howard, 612;
Taylor v. Carrye, 20 How. 583;
Wesswall v. Sampson, 14 Howard, 52;
Cavill v. Heyman, 111 U. S. 176;

Hudnutter v. Eliz. Oil Cloth Co., 112 U. S. 294;
Riggs v. Johnson Co., 6 Wall. 166;
Moran v. Sturges, 154 U. S. 256;
In re Chitwood, 165 U. S. 443.

The jurisdiction of the Courts of Tennessee are defended in the Third Ground on the theory that the sovereignty of the State of Georgia cannot be extended within the boundaries of the sovereign State of Tennessee so as to prevent the State of Tennessee from exercising its paramount and supreme sovereignty, which includes the power of eminent domain, over all lands within its borders by whomsoever owned. The Courts of Tennessee, therefore, have authority to entertain petitions for condemnation of such lands filed under the power of eminent domain granted by the sovereign State of Tennessee.

The Fourth Ground defends the jurisdiction of the Courts of Tennessee on the theory that the plaintiff State of Georgia had acquired these lands within the borders of the sovereign State of Tennessee on the express condition that as to them it should be subject to suit as private railroad corporations were subject to suit, and the Courts of Tennessee having authority to entertain petitions for condemnation of the lands of private railroad corporations, it had the power to condemn the lands of plaintiff State of Georgia.

East Tennessee, Virginia & Georgia Railway v. Nashville, Chattanooga & St. Louis Railway Co., 51 S. W. 202;
(decree of the Supreme Court in this case is attached hereto as Exhibit "B")
Western & Atlantic Railroad Co. v. Taylor, 6 Heisk. (Tenn.) 408;
United States v. South Carolina, 199 U. S. 437;

United States v. Planters Bank, 9 Wheaton, 904;
Kentucky Bank v. Wister, 2 Peters 322;
Louisville etc. R. Co. v. Letson, 2 How. 550.
Pennsylvania v. Wheeling, etc. Bridge Co., 14 How. 578.

IV.

The Fifth Ground of the Motion to Dismiss is that this Court has no power to enjoin the proceedings in the Courts of Tennessee because prohibited from doing so by Section 720, Revised Statutes, which is as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens of any foreign State."

(1) This section applies to the Supreme Court as well as to other Federal Courts.

Slaughter-house cases, 10 Wall, 273, 298.

(2) The gravamen of the relief sought by the bill is an injunction against the proceedings in the State Court, and the transfer of the litigated questions to this Court. This is prohibited by R. S. 720.

Dial v. Reynolds, 96 U. S. 340;
Haines v. Carpenter, 91 U. S. 254;
U. S. v. Parkhurst-Davis Merc. Co., 176 U. S. 317;
Hull v. Burr, 234 U. S. 712.

(3) The parties are the same in the action pending in this Court and in the State Court and the matter in controversy is the same.

Tennessee Central Railroad Co. v. Campbell, 109 Tenn. 640;
Watson v. Jones, 13 Wall. 679, 714;
Hunt v. New York Cotton Ex., 205 U. S. 322.

(4) An injunction by this Court would not be one to protect its jurisdiction previously acquired.

French v. Hay, 22 Wall. 250;
Dietzsch v. Huidekaper, 103 U. S. 494;
Julian v. Central Foust Co., 193 U. S. 93;
Madisonville Traction Co. v. St. Bernard Mining Co., 106 U. S. 239.

(5) The suit in the State Court had been commenced prior to the institution of this suit and, therefore, this case does not come within those decisions permitting an injunction against the commencement of suits in a State Court on an alleged unconstitutional State Statute.

Exparte Young, 209 U. S. 123;
Truax v. Reich, 239 U. S. 33.

(6) The alleged unconstitutionality of a Statute under which a suit has been begun affords no reason for the issuance of an injunction against a suit already begun.

Robb v. Connolly, 111 U. S. 626;
Fitts v. McGhee, 172 U. S. 516;
Prentiss v. Atlantic Coast Line, 211 U. S. 210;
Singer Sewing Machine Co. v. Benedict, 229 U. S. 481.

(7) This case is unlike *Simon v. Southern Railway Co.*, 236 U. S. 115, where an injunction was issued against the enforcement of a void judgment.

Simon v. Southern Railway Co., 236 U. S. 115.

(8) Comity requires that this Court should not interfere with the suit in the State Court.

Wells Fargo Express Co. v. Taylor, 254 U. S. 175;
Moran v. Sturges, 154 U. S. 168;
Riggs v. Johnson Co., 6 Wall. 195.

V.

The Second Ground of the Motion to Dismiss is that the Court is prohibited by the Eleventh Amendment of the Constitution of the United States from assuming jurisdiction over proceedings begun or pending in State Courts.

(1) The issuance of an injunction against the suit in the State Court, begun by a citizen of Tennessee against the State of Georgia would be an assumption of jurisdiction over that suit within the prohibition of the Eleventh Amendment.

Gunter v. Atlantic Coast Line, 200 U. S. 273;

(2) A decision on the merits of the controversy pending in tne State Court and raised here, whether or not an injunction is issued, would be an assumption of jurisdiction over that suit within the prohibition of the Eleventh Amendment—if such decision could be pleaded in bar to that suit; if such decision could not be pleaded in bar, it is fruitless to render it now.

(3) The effect of an injunction against the suit in the State Court and the assumption of jurisdiction over the controversy by this Court would be to remove the case from the State Court to this Court, and this Court is without power to remove a case brought in a State Court by a citizen of one State against another State.

Postal Telegraph Co. v. Alabama, 155 U. S. 482;
Tennessee Central Railroad Co. v. Campbell, 109 Tenn. 640.

VI.

The Sixth and last Ground of the Motion to Dismiss is on the ground that the defenses set up in the bill to the petition for condemnation can be fully made and ade-

quate relief obtained in the Circuit Court for Hamilton County, Tennessee, where the petition has been filed.

(1) A Court of Equity will not assume jurisdiction of a cause where the defendant has an adequate and complete remedy at law.

Sec. 723 Revised Statute (Judicial Code 257);
Pomeroy's Equity Jurisprudence (4th Ed.) Sec. 295, et seq.;
Knox v. Smith, 4 Howard, 298;
Thompson v. Railroad Co., 6 Wallace, 134;
Oelrich v. Spain, 15 Wallace, 211;
Lewis v. Cocks, 23 Wallace, 466;
Whitehead v. Shattuck, 138 U. S. 151;
Singer Sewing Machine Co. v. Benedict, 229 U. S. 481;
Truax v. Reich, 239 U. S. 33.

(2) This is so even if the plaintiff in the suit at law threatens to invade some constitutional right of the defendant.

Singer Sewing Machine Co. vs. Benedict, 229 U. S. 481;
Robb v. Connelly, 111 U. S. 626.

(3) The plaintiff in this suit can make and fully rely upon in the State Court every defense raised to the defendant's effort to condemn its property.

Tennessee Central Railroad Co. v. Campbell, 109 Tenn. 640.

ARGUMENT

I.

As stated in the Brief, the First Ground of the Motion to Dismiss is abandoned under the authority of the *State of Pennsylvania v. Wheeling, etc. Bridge Company*, 13 Howard 518, and subsequent cases approving the doctrine there laid down.

II.

The Third and Fourth Grounds of the Motion to Dismiss proceed on the theory that the State Court had jurisdiction of the controversy, and since it had first acquired jurisdiction thereof, this Court could not oust it of that jurisdiction and itself assume jurisdiction of the controversy. However, a subsequent ground of the Motion is that this Court has no jurisdiction in any event. If this be true then the Third and Fourth Grounds have no application, because the principle relied on in them has application only to Courts of concurrent jurisdiction. By saying this Court has no jurisdiction of the controversy in any event, we do not mean that this Court never has jurisdiction to entertain a petition for condemnation of lands within the sovereignty of a State, (that the United States Courts have such jurisdiction is settled by the case of *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239), but we mean this Court has no jurisdiction of this particular suit because of the provisions of the Eleventh Amendment, to the effect that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, com-

menced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." Because of this Amendment the defendant City of Chattanooga could not have instituted in this Court, or in any other Federal Court, its petition to condemn the plaintiff's lands in controversy, and therefore, this Court has not concurrent jurisdiction with the Circuit Court of Hamilton County, Tennessee.

In view, however, of the contention made in the bill that the Courts of Tennessee have no such jurisdiction, it may not be amiss to briefly state our position in that regard.

In the first place it cannot be contended that the State of Georgia can extend its sovereignty over any lands within the borders of the sovereign State of Tennessee. If it could, then over such lands the State of Tennessee would no longer be sovereign. It must follow that its sovereignty cannot be pleaded to defeat the sovereignty of Tennessee to take these lands for its own purposes. Within her own borders Georgia is a sovereign; when she acquires lands outside of her borders she does so as a private person, and as to them is, of course, subject to suit to be dispossessed of them through the sovereignty of the State in whose borders the lands lie.

The power of eminent domain is one of the recognized attributes of sovereignty. For the State of Georgia to contend that the State of Tennessee cannot exercise this power of eminent domain over lands which the State of Georgia may own within the borders of the sovereign State of Tennessee, is to deny to the sovereign State of Tennessee this attribute of her sovereignty. In short, the State of Georgia's position is that she is sovereign

over these lands and not the State of Tennessee. Otherwise the State of Tennessee can appropriate these lands to her own use.

The bill alleges that the State of Georgia applied to the State of Tennessee "for the loan of its power of eminent domain." In other words, the plaintiff desired to be permitted to acquire these lands not in the exercise of her own sovereign power but through the exercise of the sovereign power of the State of Tennessee. Her position now is that having had no power in the beginning to acquire these lands except acting under the sovereignty of the State of Tennessee, having acquired them she holds them in her own sovereign right, superior even to the sovereignty of Tennessee. What she asked the State of Tennessee to "loan" her she says that State can never take back.

Has this property on which these railroad yards are located within the City of Chattanooga, Tennessee, become a part of the State of Georgia? Has Tennessee no longer authority and sovereignty thereover? Are crimes committed within this territory subject to punishment by the Court of Tennessee or by the Courts of Georgia? Is the title to the lands held under and by virtue of a grant of the State of Tennessee or of the State of Georgia? To deny to the State of Tennessee the power to condemn these lands for its own purposes is to substitute the sovereignty of the State of Georgia for that of the State of Tennessee. and, therefore, to deny to the State of Tennessee all rights of sovereignty over the lands in question. It would follow, therefore, that crimes committed upon this property are crimes committed within the State of Georgia, punishable only by the State of Georgia.

No one will contend that these Acts of the Tennessee Legislature were Acts of cession of this property to the State of Georgia. She was permitted to acquire these lands for use in the operation of a railroad and for no other purpose. See Acts of January 24, 1837 and February 3, 1848. The State of Tennessee every time it grants power to a railroad to acquire land in its borders certainly does not lose its sovereignty over these lands.

It is idle, therefore, to say that the State of Georgia cannot be deprived of this land under the exercise of the paramount sovereignty of the State of Tennessee. If she is to be deprived of them she must, of course, be deprived of them through suit and, therefore, it follows that she is subject to suit. If subject to suit, she is subject to suit in such a proceeding in the Courts of the State of Tennessee; for, of course, it is through her own Courts that the State of Tennessee means that this paramount sovereignty to take these lands for her own purposes shall be exercised.

Now the power of the defendant City of Chattanooga to take these lands for street purposes is a power derived from the State's paramount power to take these lands for its own purposes. This attribute of sovereignty, residing within the State of Tennessee, has been conferred by that State upon one of its branches, the City of Chattanooga, Tennessee. The City of Chattanooga, Tennessee has no right whatever to take the land except as she acts in the exercise of this sovereign power of the State of Tennessee. Therefore, of course the Courts of Tennessee have jurisdiction of a suit by the City of Chattanooga in the exercise of the State's sovereign power of eminent domain.

But, the express provisions of the Act authorizing the State of Georgia to acquire these lands for railroad purposes would seem to leave no speculation whatever, if there ever could have been any, that as to them she was subject to suit. That Act, set out on page 6 of the bill, provides that the State of Georgia "shall be entitled to all the privileges, rights and immunities *and be subject to the same restrictions, as far as they are applicable,* as are granted, made and prescribed, for the benefit, government and direction of the Hiawassee Railroad Co."

Among these privileges and restrictions, as appears from the Act as set out in the statement of facts, was the right "to sue and be sued." Likewise the State of Georgia was granted "all the rights, privileges and immunities, with the same restrictions, which are given, and granted to the Nashville & Chattanooga Railway Company." Among these privileges and immunities was the right "to sue and be sued."

It is indeed most surprising that the body of men composing the Legislature of 1851 could ever have doubted that their predecessors in 1837 had intended that the State of Georgia should be subject to suit. Apparently the State of Georgia had but little doubt on the subject, for when this very punctillious and diplomatic memorial was addressed to her, apparently admitting that the citizens of the State of Tennessee could not sue the State of Georgia with respect to its operation of this road, the State of Georgia refused to take advantage of this timidity, extreme courtesy, or whatever it may have been, on the part of her sister State, and enacted that the State of Georgia should be subject to suit *to the extent that she was already subject to suit under the Acts of the Tennessee Legislature giving her permission to extend her road*

into Tennessee, but no further. If the State of Tennessee ever had any doubts on the subject, apparently the State of Georgia never did.

Perhaps it is true, indeed it seems quite plausible to suppose it was, that in these days of militant State sovereignty, the State of Tennessee, out of an abundance of precaution not in the slightest degree to offend the dignity of one of its sister States, addressed this memorial, not with the idea of securing some new concession from the State of Georgia, but in order to ascertain whether or not the State of Georgia recognized that she was already subject to suit by virtue of the former Acts of the Tennessee Legislature. Whether this was her purpose or not, certainly it could not have been better accomplished.

Whether or not the Legislature of Tennessee had in fact any doubt on this score, the Courts of Tennessee never have had any. In 1891 the East Tennessee, Virginia & Georgia Railway Company brought a bill in the Chancery Court for Hamilton County, Tennessee, against the Nashville, Chattanooga & St. Louis Railway Co., the Memphis & Charleston Railway Co., and the State of Georgia, praying for a sale for partition of certain lands alleged to be owned by the parties in common. The State of Georgia filed a demurrer to this bill in which the jurisdiction over it of the Chancery Court of Hamilton County, Tennessee, was denied. The Chancellor held that "the State of Georgia is in Court (service having been obtained by publication) and subject to its jurisdiction in this cause." The case was carried to the Chancery Court of Appeals, which rendered an opinion sustaining the Chancellor on this point. Pertinent parts of this opinion follow:

> "Only one question remains, and that is whether the State of Georgia is properly before the Court; that is, should its demurrer for want of jurisdiction be sustained? We are of opinion that the demurrer is not well taken. This is a suit concerning the administration of property of that State in Tennessee, for the purpose for which the right to enter the State of Tennessee was given. The Tennessee Statute which extended the rights to Georgia with regard to constructing the road in Hamilton County, this State, is found in Chapter 195, Acts 1847-48. That statute gives to the State of Georgia all the 'rights, privileges and immunities, with the same restrictions which were previously granted to the Nashville & Chattanooga Railroad Company by the Act of December 11, 1845.' That Act is Chapter 1, Acts of 1845-46. That Act includes among the rights and restrictions, the right to sue and be sued. This includes, namely, the Courts of Tennessee along with other Courts."

Finally the case was carried to the Supreme Court of the State, which rendered a decree on the 26th day of October, 1898, affirming the lower courts, which on the demurrer of the State of Georgia contains this brief recital:

> "The relief allowed as to the State of Georgia does not touch her sovereignty but concerns only her contract as to the operation of the Union depot situated in the City of Chattanooga, but more fully described in the pleadings."

Certified copies of the decree of the Chancellor and of the Supreme Court are attached hereto as Exhibits "A" and "B." The opinion of the Court of Chancery Appeals is to be found in 51 S. W. Rep. 202.

The language of the Acts quoted, therefore, have been construed by the highest Courts of our State to authorize suit against the State of Georgia, and their construction of an Act of the Legislature of Tennessee is, of course, binding upon this Court.

Not only is this true, but this Court has held that a State, when she enters into private business, does so as a private person and not in her sovereign capacity.

U. S. v. South Carolina, 199 U. S. 437;
U. S. v. Planters Bank, 9 Wheat. 904;
Kentucky Bank v. Wister, 2 Peters 322;
Louisville etc. R. Co. vs. Letson, 2 How. 550;
Pennsylvania v. Wheeling etc. Bridge Co., 14 Howard, 518;
Western & Atlantic R. Co. v. Taylor, 6 Heisk. (Tenn.) 408.

It will be noted in the case of *East Tennessee, Virginia & Georgia Ry. Co. v. Nashville, Chattanooga & St. Louis Railway Co., et al.*, process was served upon the State of Georgia by publication and the courts held that publication was sufficient to bring the State of Georgia into court. Moreover, since in its ownership of this land for use in the operation of its railroad it owns them as a private person, it can be brought into court as a private person. Our condemnation statutes provide for the bringing of non-resident owners of property into court by publication. Sec. 1328 Code of Tennessee provides as follows:

Sec. 1328 Code of Tennessee provides as follows:

> "If the owner is a non-resident of the State or unknown, notice shall be given by publication as provided in this Code in similar cases in Chancery."

It would appear, therefore, that the Circuit Court for Hamilton County, Tennessee, had jurisdiction of the subject matter and that it had acquired this jurisdiction. Therefore, even if this Court had jurisdiction of the parties at all, concurrent with the Tennessee Court, it could not now take jurisdiction of the case because the Tennessee Court had first acquired jurisdiction.

Harkrader v. Wadley, 172 U. S. 148, 164;
and cases there cited;
Wallace v. McConnell, 13 Pet. 136;
Chittenden v. Brewster, 2 Wall. 191;
Orton v. Smith, 18 How. 263;
Freeman v. Howe, 24 How. 450;
Peck v. James, 7 How. 612;
Taylor v. Carrye, 20 How. 583;
Weswall v. Sampson, 14 How. 52;
Cavill v. Heyman, 111 U. S. 176;
Hudrutter v. Eliz. Oil Cloth Co., 112 U. S. 294;
Riggs vs. Johnson Co., 6 Wall. 166;
Moran v. Sturgess, 154 U. S. 256;
In re Chitwood, 165 U. S. 443.

III.

The Fifth Ground of the Motion to Dismiss is that this Court is prohibited by Section 720 of the Revised Statutes from issuing a writ of injunction to "stay proceedings of any Court of a State."

This section (Judicial Code, Sec. 265) reads as follows:

> "A writ of injunction shall not be granted by any Court of the United States to stay proceedings of any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The relief prayed for in the bill is, "let defendant be enjoined from prosecuting said proceedings in the Circuit Court for Hamilton County, Tennesee, or from interfering with plaintiff or its lessee, in the possession and use of said property." As a preliminary to this relief sought it is prayed that, "it be decreed that plaintiff's land, which the defendant seeks to appropriate as the right-of-way for a street, is not subject to condemnation by the defendant for that purpose." "The gravamen of what is desired," therefore, as is said in *Dial v. Reynolds*, 96 U. S. 340, "is an injunction to prevent his proceeding at law in the State Court."

(1) This action, therefore, comes within the express prohibition of Revised Statutes 720 (Judicial Code 265,), and, since the section applies to the Supreme Court of the United States as well as to the lower Federal Courts, (*Slaughter-house cases*, 10 Wallace 273, 289), the bill must be dismissed.

(2) In *Dial v. Reynolds, supra*, Reynolds had filed a bill in ejectment in the State Court, Dial, claiming under a deed of trust, filed a bill in the United States Circuit Court to enjoin Reynolds from proceeding in said suit, and to foreclose his deed of trust and to quiet his title to the property in question. The gravamen of this action the Court held was to enjoin the proceedings at law in the State Court. "Without this," the Court said, "all else is of no account. Any other remedy would be unavailing. Such an injunction—except under the Bankruptcy Act—no Court of the United States can grant. With this exception, it is expressly forbidden by law." The case at bar is closely analogous to the *Dial v. Reynolds* case. In fact, so far as the applicability of Revised Statutes 720 is concerned, it is on all fours with the *Dial v. Rey-*

nolds case. In *Dial v. Reynolds*, a bill in ejectment had been filed, in this case it is a petition for condemnation and appropriation of the property; in *Dial v. Reynolds*, the party in possession undertook to enjoin the ejectment suit, to foreclose his deed of trust on the property and to quiet his title thereto; in this case the defendant files this bill "to enjoin (us) from proceeding in said suit" and "to quiet his title," and for a decree "that plaintiff's land is not subject to condemnation by the defendant for that purpose. See also *Haines v. Carpenter*, 91 U. S. 245, and *U. S. v. Parkhurst-Davis Mercantile Company*, 176 U. S. 317.

In *Haines v. Carpenter*, an injunction was denied against various suits against an executor claiming title to property held by him in that capacity. In *U. S. v. Parkhurst-Davis Mercantile Co.*, an injunction was denied the United States to enjoin defendant from prosecuting claims against members of a certain Indian tribe. In *Parkhurst-Davis Mercantile Co.*, the Court quotes with approval from *Haines v. Carpenter* as follows: "The great object of the suit is to restrain and stop litigation in the State Courts, and to bring the litigated questions before the Circuit Court. This is one of the things which Federal Courts are expressly prohibited from doing." This is the avowed purpose of the bill in this case. At the beginning of the second paragraph of the bill the plaintiff says that he "brings this suit and invokes the jurisdiction of this Honorable Court to determine a controversy which has arisen between it and the defendant." At the conclusion of the second paragraph it states: "It invokes the jurisdiction of this Court to determine the controversy and prevent it from being disturbed in the rightful use of its property." The prayer is that the suit in the Circuit Court for Hamil-

ton County be enjoined and it be decreed that plaintiff's property is not subject to condemnation by the defendant. It is, therefore, true of this case that, (to quote from the *Parkhurst* case), "the great object of the suit is to restrain and stop litigation in the State Court, and to bring the litigated questions before (this Court). This is one of the things which the Federal Courts are expressly prohibited from doing."

Likewise, in the case of *Hull v. Burr*, 234 U. S. 712, the Court denied an injunction because of this Section 720 of the Revised Statutes in a case where the facts were as follows: Certain trustees in bankruptcy had filed a bill in the Chancery Court of Florida seeking to have their title determined in certain lands. The defendant to that petition filed a bill in the Federal District Court seeking to enjoin the plaintiff from asserting any title to the property in question, and for general relief. In this bill the plaintiff is undertaking to prevent the defendant from taking its land under the power of eminent domain conferred on it by the State of Tenessee.

(3) It is, of course, true that for this section to have application, the parties in the two suits must be the same, and the rights asserted and the relief prayed for must be identical. As said in *Watson v. Jones*, 13 Wallace 679, 714: "The identity in these particulars should be such that if the pending case had already been disposed of it could be pleaded in bar as a former adjudication of the same matter between the same parties." See also *Hunt v. New York Cotton Exchange*, 205 U. S. 322. But here the parties are the same and the matters in controversy are the same. The first question to be decided by the Circuit Court for Hamilton County, Tennessee, on defendant's petition filed therein, is whether or not the defendant had the right to condemn the plaintiff's prop-

erty. (*R. R. v. Campbell*, 109 Tenn. 640). If this Court should decide that the defendant herein has no right to condemn the lands of the plaintiff, that decree could be pleaded in bar to the case pending in the Circuit Court for Hamilton County, Tennessee—that is, of course, assuming that this Court has jurisdiction of the controversy.

(4) It is also true that this statute has no application to a case where the injunction is in aid of the jurisdiction of a Federal Court *previously* acquired, or to make effectual its decree, (*French v. Hay*, 22 Wallace, 250; *Dietzsch v. Huidekoper*, 103 U. S. 494; *Julian v. Central Trust Company*, 193 U. S. 93; *Madisonville Traction Co. v. St. Bernard Mining Co.*, 106 U. S. 239), but obviously this case does not come within this exception because the Tennessee Court first acquired jurisdiction of the controversy.

(5) It has also been held that the Federal Courts may enjoin a State official from *commencing* suits in the State Courts to enforce an unconstitutional State statute, but this applies only where the bill for injunction is filed prior to the commencement of the proceedings in the State Courts. Prior to the commencement of a suit, the judicial power of the State had not been invoked and, therefore, there could be no impropriety, no lack of courtesy or respect for the State Courts for the Federal Courts to take jurisdiction and enjoin all other courts from interfering with that jurisdiction. The statute prohibits an injunction against *proceedings* in the State Courts. Before the suit was commenced there were no *proceedings* and an injunction, therefore, did not contravene the statute. But after the suit had been commenced in the State Courts the Federal Courts are powerless to interfere until after final decree, when, of

course, the case may be brought here on writ of error. This was held in the leading case on this subject, *Ex parte Young*, 209 U. S. 123. See also *Truax v. Reich*, 239 U. S. 33 and numerous cases there cited. In *Ex parte Young*, where the proceedings in the State Court had not been commenced until after the filing of the bill in the Federal Court praying for an injunction against the *commencement* of suits in the State Courts, the Court said: "But the Federal Court cannot, of course, interfere with a case where the proceedings were already commenced in the State Court," (citing authorities). Further on toward the conclusion of its opinion the Court said: "When the Federal Court first obtains jurisdiction it ought, on general principles of jurisprudence, to be permitted to finish the inquiry and make a conclusive judgment, to the exclusion of all other Courts. This is all that is claimed, and this, we think, must be admitted."

(6) When the State Courts have once acquired jurisdiction, the statute operates as an absolute bar to the assumption of jurisdiction by this Court. This is so even though some right secured by the Constitution of the United States is invaded. It was said in *Robb v. Connelly*, 111 U. S. 629:

> "A State Court of original jurisdiction having the parties before it, may, consistently with existing Federal legislation, determine a case at law or equity arising under the Constitution and laws of the United States, or involving rights dependent upon such Constitution and laws. Upon State Courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever these rights are involved in any suit or proceeding before them; for the judges of State Courts are required to take an

> oath to support that Constitution. * * * If they fail therein, and withhold or deny the rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest Court of the State in which the question can be decided to this Court for final and conclusive determination."

See also:

Fitts v. McGhee, 172 U. S. 516;
Prentiss v. Atlantic Coast Line, 211 U. S. 210;
Singer Sewing Machine Co. v. Benedict, 229 U. S. 481.

(7) Finally it has been held, *Simon v. Southern Railroad Co.*, 236 U. S. 115, that Revised Statutes 720 does not prevent an injunction by the Federal Courts against the enforcement of a void judgment obtained in a State Court, but this was declared to be in no sense a departure from former decisions recognizing the binding force of Revised Statutes 720. In such case an injunction could be issued only because the proceedings in the State Court were over. The Court did not fail to recognize that so long as these proceedings were pending they had no power to enjoin them. The Court said:

> "The United States Court could not stay original or supplementary proceedings in a State Court, (*Mutual Reserve Fund Life Asso. v. Phelps*, 190 U. S. 159, 47 L. Ed. 995, 23 Sup. Ct. Rep. 707), or revise its judgment. But by virtue of their general equity jurisdiction they could enjoin a party from enforcing a void judgment."

The Court had pointed out that the State Equity Courts had power to enjoin the enforcement of a void judgment at law and it followed:

"If a new and independent suit could have been brought in a State Court to enjoin Simon from enforcing this judgment, a like new and independent suit could have been brought for a like purpose in a Federal Court, which was then bound to act within its jurisdiction and afford redress.

Notwithstanding this, the Court said, the appellant contends that even if there was equity in the bill, and even if the Railway Company could have brought a new and independent suit in the State Court to enjoin him from using the judgment, yet in the present case the Federal Court was without power to afford the same relief, because Section 720 of the Revised Statutes provides that, except in bankruptcy cases, a United States Court shall not 'stay proceedings in any Court of a State.' In 1793, when that statute was adopted (1 Stat. at L. 334, Chap. 22), Courts of Equity had a well recognized power to issue writs of injunction to stay proceedings pending in Court, in order to avoid a multiplicity of suits, to enable the defendant to avail himself of equitable defenses, and the like. It was also true that the Courts of Equity of one State or country could enjoin its own citizens from prosecuting suits in another State or country. *Cole v. Cunningham*, 133 U. S. 107, 33 L. Ed. 538, 10 Sup. St. Rep. 269. This, of course, often gave rise to irritating controversies between the Courts themselves, which could, and sometimes did, issue contradictory injunctions.

On principles of comity and to avoid such inevitable conflicts the Act of 1793 was passed. *Diggs v. Wolcott*, 4 Cranch, 179, 180 2 L. Ed. 587, 588, (1807), and *Hull v. Burr*, 234 U. S. 712, 58 L. Ed. 1557, 34 Sup. Ct. Rep. 892, (1914), (the first and last cases in this Court dealing with that question), furnish typical instances in which the statute has been applied. Those decisions, and the authorities therein cited, show that although the facts might have been such as to warrant an injunction against a suit then pending in a State

Court, yet Section 720 prevented the Federal Court from staying the proceedings in the State Court.

But when the litigation has ended and a final judgment has been obtained, and when the plaintiff endeavors to use such judgment, a new state of facts, not within the language of the statute may arise."

The Court then discussed previous cases in point and then concluded:

> which is in fact and in law, a mere nullity. That conclusion is inevitable, or else the Federal Court
>
> "The ground of the decision in the Marshall case, (and in other cases which are cited) is that while Section 720 prohibits the United States Courts from 'staying a proceeding in a State Court,' it does not prevent them from depriving a party of the fruits of a fraudulent judgment nor prevent the Federal Court from enjoining a party from using that which he calls a judgment, but must hold a judgment void for want of service is 'a proceeding in a State Court;' even after the pretended litigation has ended, and the void judgment has been obtained. Such a ruling would involve a contradiction in terms, and treat as valid for some purposes that which the Courts have universally held to be a nullity for all purposes."

The case at bar comes within no one of the classes of cases wherein it has been held that this section does not apply; here the suit has already been commenced, had been commenced before the institution of these proceedings, the proceedings are now pending, the parties are the same in the suit in the Tennessee Court and in this Court and the subject matter is the same. This Court, therefore, on principles of comity, (*Wells Fargo Express Co. v. Taylor*, 254 U. S. 175; *Moran v. Sturges*, 154 U. S. 168; *Riggs v. Johnson County*, 6 Wall. 195), as well as

by virtue of Revised Statutes 720, will not interfere with the suit in the State Court, and will not assume jurisdiction of the case until the case has been brought here "by writ of error, in an orderly, judicial way."

IV.

The Second Ground of the Motion to Dismiss is that this Court is without jurisdiction to entertain the bill by virtue of the provisions of the Eleventh Amendment to the Constitution of the United States, which provides that "the judicial power of the United States shall not be construed to extend to any suit at law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." We think this amendment raises an absolute bar to this bill.

(1) The issuance of a writ of injunction to prohibit the defendant from prosecuting the suit of the City of Chattanooga, Tennessee v. State of Georgia, et al., pending in the Circuit Court for Hamilton County, Tennessee, would, of course, constitute an assumption by this Court of jurisdiction over that suit. If the Court has no jurisdiction over that suit commenced by a citizen of Tennessee against the State of Georgia, then it has no power to issue an injunction against it. It is perhaps not surprising that we have been able to find but one decision of this Court where this question was discussed; the proposition seems so plain as never to have been questioned. However, in *Gunter v. Atlantic Coast Line Railroad Co.*, 200 U. S. 273, the lower Court did issue an injunction against the Attorney-General of South Carolina from prosecuting in the State Courts a certain action against the Atlantic Coast Line Railroad Co., for the collection of taxes. The Attorney-General, contending that

an injunction against him was in fact an injunction against the State, insisted that the Court below had no power to issue the injunction by virtue of the provisions of the Eleventh Amendment to the Constitution and of the provisions of Section 720 of the Revised Statutes. Upon this point the Court said:

> "Section 720 Revised Statutes was originally adopted in 1793 whilst the Eleventh Amendment was in process of formation in Congress for submission to the States, and long, therefore, before the ratification of that amendment. The restrictions embodied in the section were, therefore, but a partial accomplishment of the more comprehensive result effectuated by the prohibition of the Eleventh Amendment. Both the statute and the Amendment relate to the power of Courts of the United States to deal, against the will and consent of a State, with controversies between it and individuals."

A number of years prior to the bringing of that suit a suit had been brought in a United States Court by the predecessors of the Atlantic Coast Line Railroad Co. to prevent the State of South Carolina from assessing taxes against it which it was alleged it had contracted not to do, when it granted plaintiff a charter. The State of South Carolina in the first suit made no point of its immunity from suit and a decree was rendered. The injunction granted in *Gunter v. Atlantic Coast Line Railroad Co.* was considered as ancillary to the original proceeding and, therefore, it was held that the provisions of the Eleventh Amendment and the construction placed upon it, as quoted above, had no application to the case. In the absence of such circumstances, however, it was held that the provisions of the Eleventh Amendment absolutely prevented the Courts of the United States from assuming jurisdiction over such a suit.

(2) Not only has the Court no authority to issue an injunction against the proceedings in the Circuit Court, but it cannot decline the prayer for injunction and, in the absence of an injunction, proceed to determine the controversy raised in the suit in the Tennessee Court. To do even this would be to assume jurisdiction over that suit, for the only purpose of a decision of the controversy by this Court would be to settle the rights of the parties. If this Court's decree would settle the rights of the parties, then after it had been rendered it would act as a bar to further proceedings in the State Court. The raising of a bar to that suit is an assumption of jurisdiction over it and this the Constitution forbids. If this Court's decree would not bar further proceedings in the suit in the State Court, but notwithstanding the decree, that Court could proceed to final judgment unless reversed by this Court on writ of error, then there is no point in this Court's rendering a decee at this stage.

(3) The effect of an injunction against the suit in the Circuit Court and the assumption of jurisdiction by this Court to determine the defendant's right to condemn plaintiff's land would be to remove from the Circuit Court of Hamilton County, Tennessee, to this Court the suit begun by a citizen of the State of Tennessee against the State of Georgia, since one of the controversies in the suit in the Circuit Court of Hamilton County, Tennessee is whether or not the City of Chattanooga, Tennessee has power to condemn the lands of the plaintiff State of Georgia. *Tennessee Central Railroad Co. v. Campbell*, 109 Tenn. 640. Under the Tennessee law this constitutes one distinct branch of the proceedings in the Circuit Court, from a decision on which an appeal immediately lies to the Supreme Court of the State, with-

out awaiting an actual entry upon the plaintiff's land by the defendant, or the determination of the amount of damages. *Railroad v. Campbell*, 109 Tenn. 640. This Court has held that no power exists in the Federal Courts to remove from the State Courts a proceeding instituted against one of the States.

Postal Telegraph Co. v. Alabama, 155 U. S. 482.

V.

Jurisdiction of this Court cannot be invoked as a Court of Equity to restrain a proceeding at law and to assume jurisdiction in this case, because the defenses herein set up to the proceedings in the Law Court can be fully made and relied upon in the suit at law. This principle has long been recognized and the statutes so provide. Section 257 of the Judicial Code (R. S. 723), provides:

> "Suits in equity shall not be sustained in any Court of the United States in any case where a plain, adequate and complete remedy may be had at law."

The decisions following this statute, which is merely a re-enactment of the "common law," are numerous.

Pomeroy's Equity Jurisprudence, (4th Ed.) Sec. 295, et seq.;

Knox v. Smith, 4 Howard, 298;

Thompson v. Railroad Co., 6 Wallace, 134;

Oelrich v. Spain, 15 Wallace, 211;

Lewis v. Cocks, 23 Wallace, 466;

Whitehead v. Shattuck, 138 U. S. 151;

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481;

Truax v. Reich, 239 U. S. 33.

It applies to a case where some constitutional right of the defendant is being invaded. In *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, the Court says:

> "In the Courts of the United States it is a guiding rule that a bill in equity does not lie in any case where a plain, adequate and complete remedy may be had at law. The statute so declares, Rev. Stat. Sec. 723, U. S. Comp. Stat. 1901, p. 583, and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the Court to interpose the objection *sua sponte*, and in other cases it is treated as waived if not presented by the defendant *in limine*. *Reynes v. Dumont*, 130 U. S. 354, 395, 32 L. Ed. 934, 945, 9 Sup. Ct. Rep. 486; *Allen v. Pullman Palace Car Co.*, 139 U. C. 658, 35 L. Ed. 303, 11 Sup. Ct. Rep. 682. There was no waiver here. The objection was made by the demurrer and again by the answer; and so, if it was well-grounded, it was as available to the defendant in the Circuit Court of Appeals to prevent a decree against them there as it was in the Circuit Court. *Boise Artesian Hot and Cold Water Co. v. Boise City*, 213 U. S. 276, 53 L. Ed. 796, 29 Sup. Ct. 426.
>
> In the last case it was said of the pertinency of the guiding rule in cases such as this (p. 281): 'A notable application of the rule in the Courts of the United States has been to cases where a demand has been made to enjoin the collection of taxes or other impositions made by State authority, upon the ground that they are illegal or unconstitutional. The decisions of the State Courts in cases of this kind are in conflict and we need not examine them. It is a mere matter of choice of convenient remedy for a State to permit its Courts to enjoin the collection of a State tax because it is illegal or unconstitutional. Very different considerations arise where Courts of a different,

> though paramount, sovereignty, interpose in the same manner and for the same reasons. An examination of the decisions of this Court show that a proper reluctance to interfere by prevention with the fiscal operations of the State governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired. It has been held uniformly that the illegality or unconstitutionality of a State or municipal tax or imposition, is not of itself a ground for equitable relief in the Courts of the United States. In such cases the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable, and efficient as the remedy in equity."

So, whether or not the defendant herein is threatening to invade the plaintiff's immunity from suit, that alleged fact furnishes no ground for the interposition of this Court. That defense can be fully made and relied upon in the proceeding in the State Court, and "we must assume—a decent respect for the States requires us to assume—that they will enforce *every right* secured by the Constitution. If they fail to do so, the party complaining has a clear remedy for the protection of his rights, for he can come here by writ of error, in an orderly, judicial way, from the highest Court of the State to this tribunal for redress in respect to every right claimed or secured by that instrument and denied by the State Court." To the same effect see the quotation *supra* from *Robb v. Connelly*, 111 U. S. 626, and other cases there cited.

If this defense is not sufficient to authorize the interposition of this Court, clearly the other defenses are not. They are that the defendant has no authority to condemn lands the State of Tennessee has permitted a sister State to acquire within its borders, or to condemn lands al-

ready devoted to a public use for an inconsistent use or one that will materially impair or destroy the former use. This defense can also be made in the State Court. The first question to be decided by the State Court is whether or not the petitioner has the right to condemn the land desired. To every condemnation suit there are two phases: (1) the right to condemn, and (2) the amount of damages to be paid. There is no right of entry on the defendant's land until after final determination of the petitioner's right to condemn.

This is discussed and decided in *Tennessee Central Railroad v. Campbell*, 109 Tenn. 640. That case recites in more or less detail the procedure in such cases. For the convenience of the Court we quote extensively from it:

> "The Circuit Judge, upon the preliminary trial of the issues thus made, held that the plaintiff had the right to have the land described in its petition condemned for railroad purposes, and appointed a jury or commissioners to lay it off by metes and bounds, and assess the damages, actual and incidental, accruing to the defendants in consequence of such appropriation.
>
> The defendants tendered a bill of exceptions to this action of the Court, and prayed an appeal to this Court, which was denied; and the commissioners are proceeding to execute the order of the Court in the premises, but as yet have filed no report of their action.
>
> The case is now before us upon a petition for writs of certiorari and supersedeas to bring it into this Court to review this judgment of the trial Court, and stay the proceedings thereunder until it shall be here heard and determined. This application is resisted by the plaintiff, insisting that this Court cannot acquire or take jurisdiction of cases for the correction of errors in judgments

and decrees of trial courts otherwise than by appeal, appeal in the nature of a writ of error, and writ of error, and that writ of certiorari will not lie for this purpose, and, further, that the judgment of the Circuit Court in this case is not final, and cannot be reviewed by any proceeding in error. * * *

We are of the opinion that certiorari is the proper proceeding to bring before this Court for review judgments in condemnation proceedings of this character appropriating the lands of citizens for public purposes, where the right of the plaintiff to do so is for any reason denied; and, where merits are shown, a supersedeas will issue to prevent the petitioner from entering upon the premises until the case is here decided.

It only remains to determine at what stage of the proceedings the judgment of the Circuit Court is so far final as to be reviewable in this way. This is an anomalous action or proceeding, dual in its objects and results. The plaintiff recovers of the defendant the land sought to be appropriated, and the defendant recovers of the plaintiff the value of the land and the damages accruing to the remainder of their property in consequence of the appropriation and the construction thereon of the proposed improvement, the former of which judgments may be pronounced and executed before the case is tried upon the question of damages.

The form of petition and the procedure in the Circuit Court are prescribed in detail by the statute authorizing it, and are to be found in the Code of 1858, Secs. 1325-1348 (Shannon's Code, Secs. 1844-1867).

When the petition is filed and the defendant brought before the Court by due service of notice, he may make defense by any appropriate pleading, and show cause, if he can, why the relief sought should not be granted.

A jury of five or more commissioners is then appointed and instructed to go upon the land along with the Sheriff of the county, lay off by metes and bounds the land required for the proposed work, and asses the damages of the owner, and reduce their action to writing, and deliver the same to the Sheriff, to be returned by him to the Court in which the proceeding is pending.

If no objection is made to the report, it is confirmed and proper judgment entered; but either party may except to it, and, upon sufficient reasons appearing, new commissioners may be appointed, who will be instructed and proceed in the same manner as those first appointed. Either or both parties on the coming in of the report of the first or the second jury, if a second be appointed, may object thereto, and demand and have a trial in the usual manner before the Court and a jury of all issues arising in the assessment of damages the owner of the property may be entitled to recover.

But the petitioner, notwithstanding the case is undetermined upon the question of damages, and is yet pending for trial upon this issue, may file a bond, with solvent sureties, in a sum double the amount of the damages assessed by the commissioners, payable to the defendants, and conditioned to abide by and perform the judgment of the Court in the premises, and take possession of the property sought to be appropriated, and proceed with the construction of its railroad, or other improvement upon the same. The proceeding in this case has not progressed this far, as the commissioners have not filed any report of their action.

The plaintiff insists that there is no final judgment which can be reviewed by proceedings in error until the issues as to the damages to be recovered are tried, and the amount adjudged, while the defendants insist that the order of the

Court appointing the commissioners to lay off the land and assess the damages is such a final judgment.

We do not agree with either contention. There may be two final judgments in this action, which can be reviewed by separate proceedings in error prosecuted at different times.

The Circuit Court by implication clearly has authority, upon the filing of the report of the commissioners, and an appeal therefrom upon the question of damages, to a trial by jury in Court, to award a recovery of the land described in the report, and issue a writ of possession to the plaintiff upon bond being filed as provided by the statute. Judgment for the recovery of the land is final for every purpose. The exact part to be appropriated is ascertained and set apart, and possession given the plaintiff. There is nothing left in relation to this part of the proceeding to be adjudged, and it is immaterial to the plaintiff whether the other branch is ever tried. It will not do to hold that the defendants must await until the question of damages has been adjudged before they can bring the judgment depriving them of the title and possession of their property before this Court to have the right of plaintiff to appropriate it finally determined. It would be of small consolation and little profit to them, should the judgment of the Trial Court be reversed in the end, if in the meantime the plaintiff has dismantled their premises, made excavations therein, or erected fills or structures upon it, so altering and changing it as to destroy its value to them; and it must be remembered that the bond which the plaintiff is required to give does not cover damages done to the property in constructing the railroad or other improvements upon the same, if the Court upon final hearing determine that the plaintiff is not entitled to appropriate it. It only covers the damages which the defendants are entitled to when the land is condemned.

> The defendants, if the insistence of the plaintiff is correct, could be deprived of the possession of their property, and its usefulness destroyed, without compensation made or secured; and, if the plaintiff be insolvent, their final success in resisting its attempts to appropriate their land would be a fruitless victory.
>
> No such result was contemplated by the Legislature, nor can be suffered to take place. Every citizen has a right to have the decision of the Court of last resort in cases of this character before he can be deprived of the possession of his property. Every principle of right and justice demand that this be so.
>
> We are, therefore, of the opinion that in proceedings of this kind, when the right to appropriate property is contested by the owner, and the case reaches the stage where the petitioner can give bond and take possession of the portion of the premises set apart in the report of the commissioners, and file such a bond, the judgment of the Circuit Court condemning the property may be brought before this Court for review by certiorari, although the issue as to the damages to be recovered by the defendants, if the appropriation is allowed, are yet pending, untried, in the lower Court, and that in a proper case supersedeas will issue to restrain the plaintiff from taking possession until the case is here determined."

It will thus be seen that every defense and objection alleged in the bill can be fully made and relied upon in the State Courts and that from the final decision of the State Courts the case can be brought here by writ of error for review, *before* any rights of the plaintiff herein have in any wise been disturbed. Such being the case, this Court as a Court of Equity will not interfere but leave to the plaintiff his remedy at law, that remedy being equally efficacious with the remedy here.

VI.

For the reasons stated, therefore, (1) because, even if this Court was a Court of concurrent jurisdiction with the Circuit Court of Hamilton County, Tennessee, still, that Court having jurisdiction of the subject matter and of the parties and having first acquired jurisdiction, comity requires that this Court shall not interfere with it; (2) because this Court is prohibited by R. S. 720 (Judicial Code 265), from enjoining proceedings in a State Court; (3) because this Court has no jurisdiction over the "proceedings commenced in the State Court"; and (4) because the plaintiff herein has an adequate and complete remedy at law; for these reasons, it is respectfully submitted that the injunction prayed for should be denied and the bill dismissed.

Respectfully,

SAM E. WHITAKER,
City Attorney.

SIZER, CHAMBLISS & CHAMBLISS,
Of Counsel.

APPENDIX

EXHIBIT "A"

DECREE OF CHANCERY COURT

Monday Morning, April 19, 1897.

Court met pursuant to adjournment, present and presiding the Hon. T. M. McConnell, Chancellor, when the following proceedings were had, viz.:

E. T., V. & Ga. Ry. Co.
vs. No. 5719.
N., C. & St. L. Ry Co. et al.

In this cause it appearing to the Court that respondent Western & Atlantic Railroad of Georgia is regularly in Court by publication and by the entrance of appearance by counsel, and that said Western & Atlantic Railroad has not filed any answer in this cause, it is therefore decreed by the Court that judgment *pro confesso* be taken and had against said Western & Atlantic Railroad and that this cause be set for hearing *ex parte* as to said Western & Atlantic Railroad.

And thereupon this cause came on to be heard before the Hon. H. A. Chambers, Special Chancellor, on the pleadings, proof and argument of counsel, and after mature deliberation the Court doth order and decree as follows:

I.

All demurrers filed by defendants are overruled.

The State of Georgia is in Court and subject to its jurisdiction in this cause.

II.

The title to the soil or ground of the lot in controversy is in the State of Georgia. Complainant, the East Tennessee, Virginia & Georgia Railroad Company and its assignees, or successors in interest, the Southern Railway Company, have acquired no title to said lot by estoppel or otherwise.

III.

The buildings and improvements now on the lot, including floors, tracks and foundation, parts of walls and pillars, everything except the soil itself, belong to the four parties to this case, to-wit:

1. The State of Georgia,
2. Nashville, Chattanooga & St. Louis Railway Co.,
3. Southern Railway Company,
4. The Memphis & Charleston R. R. Co.,

in proportion that the money furnished by each used in making and maintaining the buildings and improvements now on the lot, including taxes and operating expenses, bears to the present value of said buildings and improvements, less any profits or income therefrom.

But in fixing the proportion, the rents paid by the Memphis & Chattanooga Railroad Company are not to be considered or credited to it. No credit will be allowed to it or to complainant for rents for their interests in said property since they withdrew from and ceased to use it. They will not be charged or the other parties credited with any extraordinary improvements on the property since their withdrawal, but with only ordinary repairs to keep the property in good condition.

The State of Georgia is to be treated as representing and owning the interests of the Western & Atlantic Railroad, and the Western & Atlantic Railroad Company.

IV.

A reference will be had to the Master to ascertain from the proof on file, and any other hereafter produced by the parties, and report.

First—The amount furnished by each party and used in the making and maintaining the buildings and improvements now on said lot.

Second—The present value of said buildings and improvements.

Third—The present value of the interest of each party in said buildings and improvements according to the proportion hereinafter declared.

Fourth—When these amounts and values are fixed by the Court on said report, or otherwise, the State of Georgia and the Nashville, Chattanooga & St. Louis Railway Company shall have the option, for such time as the Court may then determine, to buy the interests of the complainant and the Memphis & Charleston Railroad Company, at the fixed present value or any amount on which they may agree, and if they fail to buy under this option, then a public sale of the buildings and improvements, with the right of removal, will be made on such terms as the Court may fix in making the order for sale, and the proceeds divided pro rata on the respective interests of the several parties, and costs to be equally divided between the four parties.

Sixth—Appeal may be had now if desired.

And the Nashville, Chattanooga & St. Louis Railway and the Western & Atlantic Railroad Company pray an appeal from said decree to the next term of the Supreme Court of Tennessee, to be held at Knoxville, which appeal is granted upon said appellant entering into appeal bond in the sum of two hundred and fifty ($250) dollars, conditioned as required by law.

Complainant, East Tennessee, Virginia & Georgia Railway Co., and petitioner, Southern Railway Co., and cross-complainant Memphis & Charleston Railroad Co., pray an appeal from all of said decree except the portion allowing judgment *pro confesso* against the Western & Atlantic Railroad Company, and the portion overruling the demurrers and adjudging the State of Georgia subject to the jurisdiction of this Court, to the next term of the Supreme Court to be held at Knoxville, Tennessee, which appeal is granted upon said complainants E. T., Va. & Ga. Ry. Co., and petitioners, Southern Ry. Co. giving a joint appeal bond in the sum of two hundred fifty dollars, conditioned as required by law, and upon said Memphis & Charleston R. R. Co. giving an appeal bond in the sum of two hundred fifty dollars, conditions as required by law.

The State of Georgia prays an appeal from all of said decree, except so much thereof as decrees that the title to the soil and ground of the lot in controversy is in said State and so much thereof as decrees that the State of Georgia is the owner of and representative of the Western & Atlantic R. R., which appeal is granted upon said appellant entering into an appeal bond in the sum of $250, conditioned as required by law.

In making out the transcript for the Supreme Court by agreement of all the parties, the Clerk and Master will not copy into the transcript any of the vouchers or other exhibits to the depositions except the exhibits to the statement or deposition of Stacey Lord, nor any of the other documentary evidence used on the trial except the transcript in cause No. 1367, and it is agreed that any party to the suit may use on the trial in the Supreme Court any part of the original record that was filed in the Chancery Court, the same as though copied into and made a part of the transcript.

But the Clerk and Master will copy into the transcript any part of the record that he may be directed so to do in writing by any of the attorneys for any part of the suit.

And thereupon Brown and Spurlock appeared in open Court and acknowledged themselves as sureties of said N., C. & St. L. Ry. and the W. & A. R. R. Co., for the costs of said appeal and thereupon appeared in open Court, Garnett Andrews and W. P. McClatchey and acknowledged themselves as sureties of the State of Georgia for the cost of said appeal, which may be adjudged against said State of Georgia.

And thereupon appeared in open Court Cooke, Swaney & Cooke, and acknowledged themselves as sureties of East Tennessee, Virginia & Georgia Railway Company, the Southern Railway Company, and the Memphis & Charleston R. R. Company for the costs of said appeal which may be adjudged against them or either of them.

I, Sam Erwin, Clerk and Master of the Chancery Court for Hamilton County, Tennessee, hereby certify that the foregoing is a full, true and complete copy of the final decree in the above styled cause, as appears of record in my office.

In Testimony whereof I have hereunto set my hand and official seal of the Court at office in Chattanooga, Tennessee, this April--------1923.

SAM ERWIN,
Clerk & Master.

EXHIBIT "B"

DECREE OF THE SUPREME COURT

EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY CO.

vs.

NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY CO.

MODIFIED

This cause came on to be heard this 26th of October 1898, before the Honorable Supreme Court of Tennessee, on the appeal of all the parties from the decree of the Honorable Court of Chancery Appeals, and the same having been fully heard and argued, the court is pleased to order, adjudge and decree that there is no error in the decree of the Court of Chancery Appeals except so much thereof as adjudicates that the Southern Railway Company and the Memphis and Charleston R. R. Company are still entitled to use the privileges secured to them by the contracts set out in complainant's original and amended bills, for the reason that the question of their present right to use such privileges is beyond the pleadings in the case.

It is therefore ordered, adjudged and decreed that the decree of said Court of Chancery Appeals be modified and in all things affirmed. The relief allowed as to the State of Georgia does not touch her Sovereignty, but concerns only her contracts as to the operation of the Union Depot situated in the City of Chattanooga, but more fully described in the pleadings. It is further ordered, adjudged and decreed that the original and

amended bills of the East Tennessee, Virginia & Georgia Railway Company be, and the same are hereby dismissed. It is also adjudged and decreed that the Southern Railway Company, which was made a party complainant in the place and stead of said East Tennessee, Virginia and Georgia Railway Company, upon its own application and Cook, Swaney & Cook, sureties on its prosecution bond and appeal bond pay one-half of the costs and Memphis & Charleston R. R. Company and surety F. P. Poston pay the other half, for all of which execution may issue.

And it appearing to the Court from the pleadings and the statements of counsel at bar that the question of title to the lot on which the depot stands as between the State of Georgia and the Nashville, Chattanooga & St. Louis Railway Company is not involved or intended to be litigated or adjudicated in this cause, and there being no controversy in this cause between said parties nothing is adjudicated as between them, and no recitation in this decree or the decree of the Court of Chancery Appeals will operate to prejudice the right of either of said parties as against the other.

I, S. E. Cleage, Clerk of the Supreme Court of the State of Tennessee, do hereby certify that the foregoing is a true, perfect and complete copy of the decree of said Court, pronounced at its --------term, 1898, in the case of East Tennessee, Virginia & Georgia Railway Co. v. Nashville, Chattanooga & St. Louis Railway Co., as appears of record, now on file in my office.

In Testimony whereof I have hereunto set my hand and affixed the seal of the Court at office in Knoxville, on this the--------day of May, 1923.

S. E. Cleage.
Clerk.

SUPREME COURT OF THE UNITED STATES

October Term, 1923

No. 26 Original

STATE OF GEORGIA

v.

THE CITY OF CHATTANOOGA.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

This is an original suit by the State of Georgia against the City of Chattanooga, a municipal corporation of Tennessee, to prevent the appropriation of a right of way for a street through a railroad yard belonging to the Plaintiff but located within the corporate limits of Defendant. It is to be heard on the motion to dismiss.

THE BILL

The case made by the bill is this. The State of Georgia, in 1837, undertook the construction of a railroad known as the Western & Atlantic Railroad, from Atlanta, its capital city, to Chattanooga in the State of Tennessee, and the Legislature of Tennessee granted it the right to acquire the necessary right of way from the Georgia line to Chattanooga and the land in Chattanooga needed for terminal facilities. In 1852, it acquired, by purchase, about eleven acres of land, then in the outskirts of Chattanooga, on which it located its switch yards and other terminal facilities. The City, however, has grown until these yards are now near the business center.

The State of Georgia did not create a corporation to own the railroad, but paid for it out of State funds and has ever since held it as property of the State, and the title to the eleven acres in question is in the State of Georgia. Until 1870, the railroad was operated by the State itself. Since then it has been operated by railroad companies to whom the state has, from time to time, leased it.

For some years, there has been an agitation in Chattanooga for the extending of one of its principal streets through these yards. To do this would be to practically destroy the railroad yards, and the State of Georgia has declined to consent and has denied the right of the City to condemn the necessary right of way.

The right of the State of Tennessee to condemn these lands or to authorize the city to condemn them is not now involved. The contention is that it has conferred upon the city no such power. This contention rests upon two facts. The property in question is (1) already devoted to a public use and (2) does not belong to an individual or a private corporation.

The significance of these facts arises from the fact the City of Chattanooga has been granted the power of eminent domain only to the extent that that power is granted by the general statutes of the State of Tennessee to corporations. And these laws do not authorize the appropriation of the lands in question because:

(1) The general statutes do not confer the power to appropriate land already devoted to a public use, and such lands can be taken only when a statute has given the specific authority. Railroad v. Cemetery Co., 116 Tenn. 400; Railroad v. Memphis, 126 Tenn. 267; Railroad v. Mayor & Aldermen, 137 Tenn. 491; Williamson County v. Turnpike Company, 143 Tenn. 628.

(2) The power of eminent domain delegated by the general statutes is limited to the taking of the real estate "of individuals" (Code 1858 Sec. 1325, Thompson's Shan-

non's Code Sec. 1844) and "of private corporations" (Acts 1885 ch. 135, Thompson's Shannon's Code Sec. 1868). And no power has been delegated to take property which the State has permitted a sister State to acquire.

Until recently, the city has recognized its lack of power to condemn the proposed right of way and has repeatedly applied to the Legislature for the necessary authority, but has, as often, been refused. Its present officials, however, have assumed, by ordinance, notwithstanding the long recognized lack of authority, to open a street through these yards in such a way, the bill alleges, as will destroy them for railroad and switch yard purposes.

We have stated the allegations of the bill only in outline for the reason that the motion to dismiss does not call in question the merits of the bill. It may, therefore, be assumed that, on the facts alleged, Plaintiff is entitled to relief.

The only other fact alleged, and the fact on which the motion rests, is that, prior to the filing of the bill in this cause, the City of Chattanooga had commenced a proceeding in the Circuit Court of Hamilton County, Tennessee, to condemn the proposed right of way. The petition in that proceeding names the State of Georgia and its lessees as defendants, and publication has been made for the State of Georgia as for a non-resident defendant.

The bill alleges that the State of Georgia has never consented to be sued in the courts of Tennessee. And this allegation must be taken as true unless such consent is to be inferred from the terms of the Act of the Legislature of Tennessee under which the bill alleges that Plaintiff was permitted to acquire the land in question.

The prayer is that the Defendant be enjoined from prosecuting its condemnation proceedings or, at all events, from "interfering with Plaintiff or its lessee in the possession and use of said property."

THE MOTION TO DISMISS.

The motion to dismiss, assuming that, on the facts alleged, the merits of the controversy are with the Plaintiff, challenges the jurisdiction of the court on six grounds.

The first ground assigned has very properly been abandoned. The remaining grounds are, in substance as follows:

2. The court is forbidden by the Eleventh Amendment to the Constitution to take jurisdiction of a suit against a state by a citizen of another state.

3. The jurisdiction of the state court having been first invoked and that court having jurisdiction of petitions to condemn land, this court can not interfere.

4. The State of Tennessee granted permission to the State of Georgia to acquire these lands on condition that, as to them, the latter should be subject to the jurisdiction of the Tennessee courts.

5. The court is forbidden to grant the injunction by Section 720 of the Revised Statutes.

6. The court is without jurisdiction because the questions now made will be equally available to Plaintiff as defenses to the action in the state court.

BRIEF.

I.

ELEVENTH AMENDMENT NOT APPLICABLE.

It is true, of course, that the Eleventh Amendment would not permit the City of Chattanooga to sue the State of Georgia in this court. But it is a novel suggestion that that Amendment can stand in the way of the State of Georgia bringing to this court any controversy it may have with the City of Chattanooga.

The idea of counsel seems to be that we are asking this court to take jurisdiction of a suit which has been commenced in a state court against the state of Georgia. This, of course, is a misconception. We are not seeking to have the proceeding in the state court removed to this court. The theory of the bill is that, as to the State of Georgia, any decree rendered in that case will be void. But there is a controversy between the State of Georgia and the City of Chattanooga. The latter is about to appropriate the property of the former under color of a void proceeding. The relief sought is an injunction to prevent Defendant from taking plaintiff's land either through this proceeding or otherwise. The suit in this court is one by and not against the State. We can not regard this contention as seriously made.

II.

The State Court has not acquired and can not acquire jurisdiction of the State of Georgia, without its consent. And the pendency of the proceeding in that court can not take from this court its jurisdiction to determine the controversy presented by the bill.

The third and fifth grounds of the motion are substantially the same and present the contention that because a condemnation proceeding was commenced in the State court before this bill was filed, this court can not now take jurisdiction and, particularly, is forbidden by section 720 of the Revised Statutes to enjoin the prosecution of that proceeding.

It, of course, will not be denied that the State of Georgia is not subject to be sued by a citizen of another State in any court without its consent. It follows that, without such consent, no court can ever acquire jurisdiction of a suit by a citizen to which that state is a necessary party. The owner of land is always a necessary party to a proceeding to condemn the land. Assuming, as we

will presently show, that the necessary consent has not been given, the prosecution of the proceeding in the state court will be an idle ceremony for any judgment appropriating Plaintiff's land will be a nullity. The pendency of that proceeding, therefore, can not deprive this court of its jurisdiction to determine the controversy when properly presented.

When the proceeding was commenced in the State court, the State of Georgia might have given that court jurisdiction by entering its appearance. It did not choose to do so. Instead, it brought the controversy here to prevent the City of Chattanooga from using a void proceeding to appropriate its property.

If it be conceded that Section 720 of the Revised Statutes forbids this court to enjoin the City from prosecuting its void proceeding to final judgment, the jurisdiction to enjoin the use of that judgment to obtain Plaintiff's property can not be doubted. Indeed the brief for Defendant seems to admit the jurisdiction to enjoin a void judgment.

This subject is exhaustively discussed in Simon v. Southern Railway Company, 236 U. S. 115. In that case, at page 126, this was quoted from Marshall v. Holmes, 141 U. S. 589:

> Authorities would seem to place beyond question the jurisdiction of the circuit court to take cognizance of the present suit, which is, none the less, an original independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it can not require the state court itself to set aside or vacate the judgment in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the stat-

> ute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud.

And Mr. Justice Lamar added:

> And if a United States court can enjoin a plaintiff from using a judgment, proved to be fraudulent, it can likewise enjoin him from using a judgment absolutely void for want of service.

It was then said that the ground of the decision in the Marshall case and the many cases following it—

> is that while Section 720 prohibits United States courts from "staying proceedings in a state court," it does not prevent them from depriving a party of the fruits of a fraudulent judgment, nor prevent the Federal courts from enjoining a party from using that which he calls a judgment, but which is, in fact, and in law, a mere nullity. That conclusion is inevitable, or else the Federal court must hold that a judgment—void for want of service—is "a proceeding in a state court" even after the pretended litigation has ended and the void judgment has been obtained. Such a ruling would involve a contradiction in terms, and treat as valid for some purposes that which the courts have universally held to be a nullity for all purposes.

If, therefore, the city had already obtained a judgment condemning the proposed right of way, this court would clearly have jurisdiction to enjoin it from taking Plaintiff's property under such void judgment. It has not yet obtained the judgment. The State of Georgia could doubtless prevent a judgment by submitting to the jurisdiction of the Tennessee court. But it prefers not to waive its right to have the controversy determined by this Court which, at its instance, has jurisdiction. Being unwilling to enter its appearance in the state court, it can

only expect that judgment, by default will go against it. And, though the judgment will be void, Defendant will, at once, proceed to execute it by taking Plaintiff's land. The proceeding in the state court is largely summary. Under the statute, as soon as a jury of view assesses the damages, the city can immediately take possession of the land, upon giving bond, and proceed with laying out the street. Thompson's Shannon's Code, Sec. 1863. Hence, even if Defendant can not be enjoined from prosecuting its proceeding to judgment, it can and ought to be enjoined from interfering with Plaintiff's possession until this court determines the controversy.

But Section 720 of the Revised Statutes does not really forbid an injunction against prosecuting the condemnation proceeding. As said by Mr. Justice Lamar in Simon v. Southern Ry. Co., supra, the inhibition is against staying "proceedings" in a state court, and this means a proceeding of which the court has jurisdiction. Otherwise it is what the learned justice called a "pretended litigation" and not a proceeding within the meaning of the statute. A Tennessee Court is utterly without power to entertain a suit against the State of Georgia without its consent. Naming that state as a defendant and making publication for it confers no power. The result is only a "pretended litigation." As shown above, this court has said that such a proceeding can not be treated as valid for any purpose. And unless it is valid for some purpose, it can not be made the basis for invoking Section 720.

The same conclusion results from another consideration. This court has taken jurisdiction of the controversy and will use such process as may be necessary to protect its jurisdiction. True an injunction will not issue to restrain proceedings previously begun in another court of concurrent jurisdiction. In other words the jurisdiction of such a court, if first acquired, will be respected. But here, when the bill was filed the state court had not acquired and was powerless to acquire jurisdiction to determine the rights of the State of Georgia.

The cases dealing with this statute were reviewed by Mr. Justice Vandevanter in Wells Fargo & Co. v. Taylor, 254 U. S. 175 and the rule stated to be that it does not prevent the Federal courts from—

> maintaining and protecting their own jurisdiction, properly acquired, and still subsisting, by enjoining attempts to frustrate, defeat, or impair it through proceedings in the state courts.

The brief for Defendant admits that this is the rule and that, if this bill had been filed before the commencement of the proceeding in the state court, the subsequent institution of such a proceeding would have been properly enjoined. The sole contention, in this regard, is that the rule does not apply "because the Tennessee Court first acquired jurisdiction of the controversy."

The argument must fail because, as we have seen, the Tennessee court was without jurisdiction since it had no power to bring the State of Georgia before it. It follows that this court has taken jurisdiction of a controversy of which no other court had previously acquired jurisdiction. This, being true, the right to enjoin any attempt to frustrate this jurisdiction by prosecuting pretended proceedings in a state court is undoubted.

Unless, therefore, the State of Georgia has consented to be sued in the Tennessee court, the Plaintiff is, on the allegations of the bill, entitled to the relief sought.

III.

The State of Georgia has not consented to be sued.

It will not be claimed that the State of Georgia has consented to be sued in Tennessee unless such consent is to be found in its own legislation or is to be inferred from the enabling acts under which it extended its road into Tennessee.

There are two of these enabling Acts.

The first, passed January 24th, 1837, (Acts of 1837 ch. 221 p. 319) which is set out in full in the bill, enacts that "the State of Georgia shall be allowed the privilege" of making surveys and locating a route for "her" Western & Atlantic Railroad in Tennessee; that, when this shall be done, "the State of Georgia shall be allowed to extend "her said railroad" from the state line to the Tennessee River; and that "she shall be entitled to all privileges, rights and immunities (except the subscription on the part of Tennessee) and be subject to the same restrictions *as far as they are applicable,* as are granted, made and prescribed for the benefit, government and direction of the Hiawassee railroad company."

The second passed February 3rd, 1848 (Acts 1847-8 ch. 195 p. 330) is also set out in the bill and is entitled "An Act conferring upon the State of Georgia additional rights in relation to the Western & Atlantic Railroad," and is as follows:

> Be it enacted by the General Assembly of the State of Tennessee, That all the rights, privileges and immunities, with the same restrictions which are given and granted to the Nashville & Chattanooga Railroad Company by the act of the General Assembly of this State, incorporating said company, passed December 11th, 1845, are, so far as they are applicable, hereby given to and conferred upon the State of Georgia, to be enjoyed and exercised by that State in the construction of that part of the Western & Atlantic Railroad, lying in Hamilton County, Tennessee, and in the management of its business.

In short, the Legislature was dealing with the State of Georgia in her character as a State. It is "the State of Georgia" who is allowed certain privileges. It is "her" railroad that is referred to—an expression then in common use in referring to a sovereign state but wholly inapplicable if it were intended to require the State of

Georgia to assume the character of a private corporation. The purpose was to give the State of Georgia permission to come into Tennessee and do the things necessary to construct and operate a railroad. The Legislature had, by previous Acts, chartered the two railroad companies mentioned to which it had granted the rights and privileges deemed necessary and proper to encourage railroad building. But it was recognized that there were many things necessary in an Act which constituted individuals a corporation, providing for the internal management of the corporation, which would be wholly inapplicable and inappropriate in an act granting permission to a sovereign state to acquire property. Hence the State of Georgia was given the same "rights, privileges, and immunities," subject to the same restrictions, as had previously been given to the two railroad companies—but only *"so far as they are applicable."*

The question then is, what provisions of the Acts incorporating these two railroad companies are applicable to the State of Georgia?

The Hiawassee Railroad Company was chartered by an Act (Local Acts. 1835-6 p. 23) which is copied in the appendix hereto.

This act constitutes certain individuals a corporation, with the powers necessary to make it a body politic, including the power to sue and be sued. The Act contains many provisions relating to the organization, the capital stock, the election and duties of officers, and the internal management of the company. These provisions were obviously inapplicable. The State of Georgia was already organized and there was, of course, no purpose that it should reorganize in a manner prescribed by the State of Tennessee. It was not to take subscriptions for stock or to issue stock. The Legislature would not assume to say through what officers the state should manage its railroad, or to control it in the manner of financing the enterprise.

Equally inapplicable was the provision incorporating certain individuals under a corporate name, with the power to sue and be sued. The provision in the Hiawassee Act is that the individuals named—

> shall constitute a body corporate, and they are hereby incorporated under the name aforesaid, and in that name they shall have perpetual succession, may sue and be sued, plead and implead, and shall possess and enjoy all the rights, privileges and immunities, with power to make such by-laws, ordinances, rules, and regulations not inconsistent with the laws of this state and the United States, as shall be necessary to the well ordering and conducting the affairs of said company.

The corresponding provision in the Nashville & Chattanooga Act which is copied in the appendix and is chapter 1 of the Acts of 1845-6 is that—

> the formation of a company is hereby authorized, which, when formed, shall be a body corporate, by the name and style of the Nashville & Chattanooga Railroad Company, and by said corporate name shall be capable in law to buy, receive by gift, hold, sell, and convey real and personal estate, as hereinafter provided, make contracts, sue and be sued, to make by-laws, and to do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of the business for which it is incorporated, and to have and use a common seal, and the same to alter and destroy at its pleasure, and shall have perpetual succession of members.

These provisions, in both acts, are appropriate to an act creating a corporation. They are the ordinary incidents of incorporation. Indeed most of them—and notably the power to sue and be sued—are so essential to cor-

porate existence that they would be implied if they had not been mentioned.

> The powers which are incidental to corporate existence and which are always implied in the absence of express restrictions are: (1) the power to have perpetual succession, or succession during the period for which the corporation is created which includes the power to elect members in the place of those who are removed by death or otherwise; (2) the power to have a corporate name and to sue and be sued, to contract obligations for purposes authorized by the charter, and to grant and receive by such name; (3) the power to purchase and hold land and chattels for authorized corporate purposes; (4) the power to have a common seal; (5) the power to make by-laws for the government of the corporation; (6) except in the case of modern joint stock corporations, the power of disfranchisement or removal of members.
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> 14 A Corpus Juris p. 252.

And this was held to be the law in Tennessee at a very early date. Mayor & Aldermen v. McKee, 2 Yerger 167, 170. In both Acts the power to sue and be sued is found in the section which brings into existence a corporate entity. There they are entirely appropriate. But that section itself is wholly inapplicable to the permission granted to the State of Georgia. No purpose is evinced to make a railroad corporation out of that state. Indeed the State of Tennessee would have been powerless to incorporate the State of Georgia. The very definition of a corporation excludes the possibility of such a thing.

> A corporation is a collection of natural persons, joined together by their voluntary action or by legal compulsion, by or under authority of an act of the legislature, consisting of a special charter or a general permissive statute, * * * *

14 Corpus Juris p. 49

And the State of Georgia is not a natural person.

Since the State of Georgia was already a legal entity those sections of the Act which merely gave to railroads the ordinary incidents of corporations were not applicable, and hence were not within the terms of the enabling acts. The State of Georgia already had the power to sue and to be sued. But it also had the sovereign power to prevent being sued. It still has this power unless as a condition of rights granted by the enabling acts, it has been surrendered. The question is do the railroad acts, outside of the incorporating sections, have this effect?

The railroad acts both provide that, after the corporation has been organized in the manner prescribed, it shall be entitled to certain rights, privileges, and immunities with respect to the construction and operation of its railroad. Obviously these are the "rights, privileges, and immunities" which the Legislature proposed to grant to the State of Georgia, a fully organized legal entity, if it would come into the State and build and operate its railroad. And, of course, they were taken with the same restrictions that applied to the railroad companies.

But, in the provisions of the Hiawassee Act conferring these rights on the company there is no reference to any court procedure or any effort to provide for the submission of any controversy to any court except in Sections 14, 15, 16 and 18.

Section 14 permits the company to enter upon private property and proceed with the construction of its road when it can not acquire the right of way by gift or purchase, and gives it immunity from suits to delay or interfere with the work of construction in the following language:

> The pendency of any proceeding in court, or before arbitrators, assesors, or valuers, to estimate the damages that will be sustained by the owner or proprietor of said land by reason of

opening said road, shall in no manner hinder or delay the progress of said work, and no order shall be made, nor shall any injunction or supersedeas be awarded by any judge or court to hinder or delay the progress of said work, the true intent of this act being that all injury that may be done to any land, without the consent of owners or proprietors thereof, by opening and constructing the railroad through the same, over and above the advantages of the road to the owners or proprietors of the lands, shall be fully and completely compensated for in damages, when ascertained, so that a work of great public utility may not be delayed by lawsuits.

Section 15 prescribes a method for assessing damages as follows:

> And if the company can not agree as to the value of the land, and the owner will not convey it in fee, either party may apply to the Circuit Court of the county where the said land lies, by giving five days notice if the owner of the land resides in the county, and twenty days notice if he resides in any other county in this state, and by advertising in some newspaper printed in Knoxville, Athens, or Madisonville, if he resides out of the state, or be a body corporate, to appoint commissioners to assess the value and condemn the land for the use of said road.

Section 16 gives the same right to take materials necessary for the construction of the road and prescribes the same proceeding in the event the price can not be fixed by agreement. It "shall be ascertained by three impartial free holders, to be appointed by a justice of the peace at the application of either party, the opposite party having three days notice of the application to the justice."

Section 18 authorizes the condemnation of lands for ware houses, &c., and prescribes the same procedure as that set out in Section 15.

The Nashville & Chattanooga Act, like the Hiawassee Act, creates a corporation and provides for the management of its internal affairs and then confers upon it certain rights and privileges with respect to the construction and operation of its railroad. In conferring the rights and privileges, no reference is made to any court proceeding and there is no requirement to submit any controversy to a court except in Sections 24 and 25.

Section 24 provides that land or right of way may be taken "at a valuation to be made by five commissioners or a majority of them, to be appointed by the circuit court of the county where some part of the land or right of way is situated',' and prescribes, in detail, the manner of proceeding in order to obtain, in the Circuit Court, a condemnation.

Section 25 deals with cases where the company may have taken possession without either purchasing or condemning, and is as follows:

> Section 25. In the absence of any contract with the said company in relation to lands through which the said road may pass, signed by the owner thereof, or by his agent, or any claimant or person in possession thereof, which may be confirmed by the owner, it shall be presumed that the land upon which the said road may be constructed, together with a space of one hundred feet on each side of the centre of said road has been granted to the company by the owner thereof, and the said company shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same be used only for the purposes of the road, and no longer, unless the person or persons owning the said land at the time that part of the road which may be on said land was finished, or those claiming under him, her or them shall apply for an assessment for the value of the said lands, as hereinbefore

directed, within five years next after that part of said road was finished. And in case the said owner or owners, or those claiming under him, her or them, shall not apply for such assessment within five years next after the said part was finished, he, she or they shall be forever barred from recovering the said land, or having any assessment or compensation therefor: Provided, nothing herein contained shall affect the right of *femes covert* or infants, until two years after the removal of their respective disabilities.

The contention on behalf of defendant is that, when the State of Georgia accepted the rights granted, it consented to be sued in Tennessee. But, as we have seen, the rights which Georgia received from Tennessee were those rights which the railroad corporations were entitled to exercise after first being organized with the power to sue and be sued. Georgia's right to sue was not derived from Tennessee. The rights granted to it were granted to a legal entity already having the power to sue and be sued. The only conditions attached to the grant were that Georgia should exercise these rights with the same "restrictions" as the railroad companies mentioned and should grant to Tennessee or Tennessee corporations like privileges when requested. Among the rights thus granted was the right of eminent domain. The restriction attached to this right was that the compensation to be paid was to be ascertained by certain Tennessee courts. If, therefore, Georgia resorted to the law of eminent domain to acquire right of way or other property it might very well be said that it consented to submit to the jurisdiction of the courts named for the ascertainment of the damages. But beyond this there is nothing in either of the enabling acts which can be said to exact a consent to be sued.

This was certainly the way this legislation was understood at the time.

As late as November 10th, 1851, the Legislature of Tennessee addressed to the Legislature of Georgia a memo-

rial on several subjects in which both states were interested. (Tennessee Acts of 1851 p. 706). One of the subjects dealt with was the fact that the State of Georgia was not subject to be sued for wrongs committed in the operation of its railroad. On this subject it said:

> All the various roads now being constructed in this state, and in which you have a large interest, are the property of incorporated companies, the stock owned chiefly by individual stockholders, and consequently liable to all the restrictions imposed by their several acts of incorporation, and amenable to all responsibilities and liabilities of common carriers. These restrictions and liabilities are conceded to be essential to a just and reasonable protection of the rights of persons and property. If by negligence, inattention, incompetency of officers or agents, or negligence of any kind, the rights or interests of any of your citizens are compromised, or sacrificed, the remedy is plain and the redress easy and certain.
>
> Not so in the case of the Western & Atlantic railroad. This is exclusively the property of your state. Its property and rights are vested in a sovereignty, and consequently exempt from the liabilities that attach to individuals or companies of incorporation. Should damages result to citizens of your state, or ours, or any of our sister States, what remedy, what redress have we or they now, but such as a sense of justice of the legislature may accord them, and which, if obtained, must be done with much delay and great expense? Difficulties enough in many instances to amount to a denial of justice, in consequence of the inconvenience of making the application to the only source of redress, the legislative power of your state.

> May we not therefore ask that you will take such action as your sense of justice and fairness may suggest?—such as will place all the interests involved on a footing of equality—such as will secure a faithful administration of your road, quiet all apprehension, and give confidence and efficiency to our great enterprises.

January 15th, 1852, the Legislature of Georgia passed an Act for the government of the Western & Atlantic Railroad. It provided for the appointment by the Governor of an officer to be known as the Superintendent of the Western and Atlantic Railroad. And, in prescribing the duties of this officer it was enacted that:

> "He shall also have power, with the approval of the Governor, to settle all claims against the Western & Atlantic Railroad, and should any dispute arise concerning any claim which can not be amicably settled, the claimant shall be authorized to bring suits in any of the Superior Courts of the several counties of this state through which the said road passes, against the Superintendent of the Western & Atlantic Railroad in his official character. The judgment which may be obtained shall be against the said Superintendent in his official character and shall be satisfied by him from the assets of said road, but shall not bind his person or individual property."

Later, when the Legislature adopted a code this provision was, with some changes, carried into the Code as follows:

> All suits against the road must be brought against the Superintendent in his official capacity in the county of Fulton where the office of said road is located, except in those cases of claims where by the law other roads are allowed to be sued elsewhere; but under no circumstances are suits against such road to be allowed against

> such road, its officers, or agents, in the State of Tennessee, beyond the right, if any, that may exist under the authority granted to this State to extend said road into Tennessee.

This was Section 974 of the Code of 1873 and is Section 1298 of the Code of 1910 which is the latest code adopted.

This is the entire legislation of the State of Georgia in relation to suits against it as the owner of the Western & Atlantic Railroad except that it consented to be subject to the same rules of liability, in certain classes of cases, that governed other railroads. This consent was given by Section 966 of the Code of 1873 and is Section 1290 of the Code of 1910 as follows:

> All laws of force regulating the liability of railroad companies in this State, for damage done by the running of locomotives, cars and other machinery, are hereby declared to apply equally to the Western & Atlantic Railroad; and in the bringing of all suits against the Western & Atlantic Railroad the same shall be regulated by the laws in existence on that subject at the time of the adoption of this Code.

The Legislature of Georgia thus expressly declined to consent for that state to be sued in Tennessee, "beyond the right, if any, that may exist under the authority granted to the state to extend said road into Tennessee."

It is argued that this language implies that Georgia understood that she had, as a condition to the building of her road, consented to be sued in Tennessee. But the use of the words "if any" negatives this idea. She proposed, in good faith to comply with the conditions upon which she had entered Tennessee and if these conditions required her to submit, to any extent, to the jurisdiction of the Tennessee courts, she would not repudiate the obligation. As we have seen, the enabling acts contemplated that when the right of eminent domain should be resorted to, the damages should be assessed by Tennessee courts.

It was possible that some claims of this kind might still be unsettled and equally possible that it might, in the future, be necessary to condemn other land. If so, Georgia would not repudiate any obligation which could fairly be inferred from the enabling acts. But, beyond this, her Legislature made it plain that she refused to consent to be sued in Tennessee.

As we have seen, only so much of the rights, privileges and immunities conferred upon the two railroads as were *applicable* were conferred upon the State of Georgia. And the restrictions referred to were only those which limited or regulated the manner of exercising those *rights, privileges and immunities*. Those portions of the acts relating to the organization and internal management of the corporation—including the conferring of ordinary corporate powers, like the power to sue and be sued—could not be applicable. The Tennessee Legislature would not, of course, assume to regulate the organization or the management of the internal affairs of a sister state.

But even if it be assumed that the Legislature thought it necessary and intended to confer upon Georgia, with respect to its railroad in Tennessee, the power to sue and be sued, it can not be said that any restrictions were imposed on this power unless the same restriction was imposed on the two corporations. And, in chartering those corporations, it was content to grant broadly and without any restrictions whatever (except in proceedings to condemn property for railroad use) the power to sue or be sued. The acts are entirely silent as to any particular court in which the corporations may either sue or be sued. The corporations are simply left capable of suing and subject to be sued in any court which, under the general law, may have jurisdiction of the parties and the subject matter. So the most that could be claimed would be that the Legislature had taken the precaution to stipulate that if Georgia built its railroad, it should be subject to suit with respect thereto in any court that might lawfully ac-

quire jurisdiction of it and the subject matter. But the State of Georgia was not subject to be sued by a citizen of another State in any court without its consent. From the acceptance of the rights granted it might be inferred that it would give this consent in such way as to provide a forum for the judicial redress of wrongs. In its anxiety to have the railroad built, the Legislature was content to leave this to the sense of fairness of Georgia, and did not deem it necessary to stipulate that the forum should be in Tennessee.

When, however, the railroad was in operation, Georgia had not yet given its consent to be sued. A later Tennessee Legislature, therefore, as we have seen, memorialized the Georgia Legislature, calling attention to the fact that the only means of redressing wrongs committed in the operation of the road was the unsatisfactory one of an appeal to the Legislature. It did not even then ask that Georgia submit itself to the jurisdiction of the Tennessee courts. It was content to ask that such steps be taken in the way of providing means for the judicial redress of wrongs as a sense of justice and fairness might dictate. Georgia met this request by consenting to be sued in its own courts. Since its road extended only some twelve miles in Tennessee, it did not deem it necessary to further waive its sovereign rights and hence declared that it would not consent to be sued in Tennessee except to the very limited, if any, extent to which it was subject to suit there under the enabling Acts. This legislation was apparently satisfactory to Tennessee. Or, if it was not, the matter became unimportant when, a little later, Georgia adopted the policy of having its railroad operated by lessees who would be subject to suit in Tennessee.

It is insisted that in the case of East Tennessee, Virginia & Georgia Ry. Co. v. Nashville, Chattanooga & St. Louis Railway Co. et al. the supreme court of Tennessee has construed the enabling acts as making Georgia subject to suit, with respect to its railroad, in Tennessee, and that

this court is bound by that construction. But this contention can not be maintained.

In that case, it appears from the opinion of the court of Chancery Appeals, which is published in 51 Southwestern Reporter at page 202, that the E. T. V. & G. R. R. Company filed a bill against two other railroad companies and the State of Georgia alleging that the four owned together a passenger station in Chattanooga and seeking to have it sold for partition. The State of Georgia appeared and demurred upon the ground that it was a sovereign state and not subject to the jurisdiction of the court. But it also filed an answer to the merits and, on the issues thus made, proof was taken. No action was taken on the demurrer until the case was heard, "on the pleadings, proof and argument of counsel" when the Chancellor decreed that:

> All demurrers filed by defendants are overruled. The State of Georgia is in court and subject to its jurisdiction. (See Appendix to Defendant's brief.)

And, on the merits, Complainant was granted relief.

The portion of the decree quoted was entirely correct without reference to the enabling Act. Georgia had demurred but it had also answered. It went to trial on the issues made by the answer, and "it has repeatedly been held that matters of demurrer must be set down for argument and disposed of before the hearing, or they will be treated as abandoned." Rogers vs. Betterton 93 Tenn. 630, 632. Moreover, the demurrer went only to the jurisdiction of the court and the filing of an answer necessarily waived it and amounted to an appearance.

It is provided by statute as follows:

> The filing of an answer is a waiver of objection to the jurisdiction of the court, and the cause will not be dismissed, but heard and determined upon its merits, although the court may be of opinion that the matters complained of are of legal

cognizance. Thompson's Shannon's Code, Sec. 6131.

And by Section 6129 it is provided that a defendant is not "required to demur, except for want of jurisdiction of the subject matter or of the person, but he may have all the benefit of a demurrer by relying thereon in his answer."

But, when objection to the jurisdiction is made by demurrer, it has always been held in Tennessee that the objection is waived if an answer is filed. Lowry v. Noff 4 Coldwell 370; Bennett v. Wilkins 5 Coldwell 240; Kirkman v. Snodgrass, 3 Head 370; Chesney v. Rodgers 1 Heisk. 239; Bright v. Newland 4 Sneed 440; Holcomb v. Canady 2 Heiskell 610; Frazier v. Tubb 2 Heiskell 662.

Hence, when the case referred to, came on to be heard, Georgia had waived its objection to the jurisdiction, consented to be sued and was, of course, subject to the jurisdiction of the court as the Chancellor decreed.

When the case reached the Court of Chancery Appeals, that court, apparently overlooking the fact that the answer had waived the objection to the jurisdiction and hence that the question raised by the demurrer had become moot, and, after reversing the decree on the merits, went into a discussion of the demurrer. The opinion was expressed that the enabling Acts made the State of Georgia subject to suit in Tennessee. But this, as we have shown, was a purely moot question.

The case was taken to the Supreme Court where the decree of the Court of Chancery Appeals was, with slight modification, affirmed in an oral opinion. The court, however, filed a brief memorandum which is published in 51 Southwestern Reporter at page 211. This memorandum and the decree, as entered, made it plain that the court did not approve or even consider the construction which the Court of Chancery Appeals had placed on the enabling acts. The merits of the case were decided against the complainant. The court added:

The relief allowed as to the State of Georgia does not touch her sovereignty, but concerns only her contracts, etc., as to the operation of a railroad depot.

The state having, by filing an answer, consented to the jurisdiction, there was no occasion to consider whether it had previously consented and the court obviously did not consider it. Certainly the court did not sustain the jurisdiction on any construction of the enabling Acts. Either it regarded the question as moot after the filing of an answer and only meant to say that the relief granted was such as could be properly granted against a state property in court; or else it was proceeding on the erroneous theory that the consent of a state was not necessary when it was sued with respect to its contracts relating to a railroad depot.

In any event, it can not be said that, in that case, the court of last resort construed the enabling Acts.

The court had previously held in Tappan v. Railroad Company 3 Lea 106 that the State of Georgia could not, without its consent, be sued in a suit the purpose of which was to enforce a lien on its railroad in Tennessee. In that case an attachment bill was filed to collect notes given by the Superintendent of the Western & Atlantic Railroad and the railroad was attached. The suit was brought against the Western & Atlantic Railroad on the theory that it was a corporation. The State of Georgia intervened and asked to be made a defendant, setting up that the railroad was owned exclusively by it and that there was no such person or corporation as the Western & Atlantic Railroad. It answered and thereby consented to the jurisdiction of the court over the controversy presented by the bill. Amended bill was then filed in which certain bonds were sued on and a lien on the railroad sought to be enforced. The State of Georgia demurred upon the ground that it was not subject to suit in Tennessee and had not consented to the jurisdiction of the

court over the controversy presented by the amended bill. The court held that this demurrer was properly sustained, saying at page 103:

> No state can be sued in its own courts, except by its consent, and certainly can not be impleaded in a foreign State against its consent. These are axiomatic principles of jurisprudence, about which there can be no doubt or debate.

We do not claim that this is a construction of the enabling Acts, for the court does not mention them. But that case is referred to as showing that, in the only case involving its railroad, in which the right to sue Georgia in Tennessee has been squarely presented to the court, the decision has been against that right.

We submit that there has been no authoritative construction of these Acts by the court of last resort and the only fair construction of them is that no consent on the part of the State of Georgia to submit to the jurisdiction of the Tennessee courts is to be implied except, perhaps, in cases in which it itself seeks to condemn property.

IV.

There is no plain and adequate remedy at law.

It is next said that this suit can not be maintained because there is an adequate remedy at law, that is the State of Georgia may go into the Tennessee court and, by way of defense, have determined the same questions it has brought to this court. If the Tennessee court had jurisdiction of the State of Georgia there might be force in this suggestion. But Georgia can not be forced to submit to the jurisdiction of that court. It has before it the threat that through the void judgment of a court, without jurisdiction of it, it will be dispossessed of its property. It asserts that, since it is unwilling to waive its rights, this is the only court which may rightfully determine the controversy which it submits. If the merits of the con-

troversy are with it any interference with its property as a result of proceedings in the state court or otherwise will be a trespass which it is the peculiar province of equity to restrain.

V.

We respectfully submit that the motion should be overruled and the injunction granted.

GEO. M. NAPIER,
Attorney General of Georgia.

ROBERT H. WILLIAMS,
WILLIAM L. FRIERSON,
JOE V. WILLIAMS,
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APPENDIX

Act Incorporating the Hiawassee Railway Company.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That William Park (and seventy other persons named) be, and are hereby, appointed commissioners, under the direction of a majority of whom subscriptions may be received to the capital stock of the Hiawassee Railroad Company, hereby incorporated; which commissioners, together with such other persons as now are or may hereafter become associated with them, their successors and assigns, shall constitute a body corporate, and they are hereby incorporated under the name aforesaid, and in that name they shall have perpetual succession, may sue and be sued, plead and be impleaded, and shall possess and enjoy all the rights, privileges, and immunities, with power to make such by-laws, ordinances, rules, and regulations not inconsistent with the laws of this state and the United States, as shall be necessary to the well-ordering and conducting the affairs of said company, and may, by their by-laws, declare vacant the place of any director for non attendance or neglect of duty; and the said company shall be capable in law of purchasing, accepting, selling, leasing, and conveying estates—real, personal, and mixed—to the end and for the purpose of facilitating the intercourse and transportation from Knoxville, East Tennessee, through the Hiawassee district, to a point on the southern boundary of Tennessee, to be designated by the commissioners hereinafter mentioned as the most practicable route to intersect the contemplated railroad from Augusta to Memphis.

Sec. 2. Be it enacted, That the capital stock of said company shall be six hundred thousand dollars, in shares of one hundred each, which shares may be subscribed for by corporations or individuals; but, so soon as four thou-

sand shares are subscribed, the subscription shall be binding, and the corporate powers of said company, as herein granted, shall commence, and have as full operation as if the whole of the shares composing the capital stock were subscribed.

Sec. 3. Be it enacted, That, if more than six thousand shares shall be subscribed to the capital stock, the commissioners, or a majority of them, shall reduce the subscription to six thousand shares by striking off from the highest subscription in succession in such manner that no subscription shall be reduced while one remains larger, estimating by shares instead of dollars, and if there shall be an excess, then lots shall be drawn by the commissioners to determine who are excluded.

Sec. 4. Be it enacted, That there shall be paid on each share subscribed, but not until four thousand shares shall have been subscribed, such sum as the president and directors hereinafter named, or a majority of them, may direct, and in such installments, not exceeding one-fourth of the subscriptions in any one year; *Provided*, No payment shall be demanded until at least thirty days' notice shall have been given by the said president and directors in the newspapers printed in the towns of Knoxville and Athens, of the time and place of payment; and, if any subscriber shall fail or neglect to pay any installment or part of said subscription thus demanded for thirty days next after the time it fell due, the stock on which it was demanded, together with the amount paid in, may, by the president and directors, or a majority of them, be declared forfeited, and, after due notice, shall be sold at auction, for the benefit of the company, if they may waive the forfeiture after thirty days' default, and sue the stockholders for the installments due, at their discretion.

Sec. 5. Be it enacted, That, if the subscription of four thousand shares, herein made necessary for the incorporation of said company, shall not be obtained by the first day of January, 1838, the same, and all subscriptions

under it, shall be null and void upon the stockholders paying to the commissioners a sum not exceeding one dollar on each share, to defray the expenses of opening the books.

Sec. 6. Be it enacted, That, on the fourth day of July, 1836, the said commissioners shall cause books for the subscription of stock to be opened in the towns of Knoxville, Tazewell, Rogersville, Jonesboro, Greeneville, Dandridge, Sevierville, Maryville, Madisonville, Columbus, Philadelphia, Athens, Calhoun, Washington, Dallas, Jasper, Pikeville, and Kingston, and at such other places as they may deem advisable, which shall continue open for the space of ten days, or until four thousand shares of the capital stock shall have been subscribed; and, as soon as it is ascertained that four thousand shares are subscribed, the said commissioners, or a majority of them, shall give notice, by advertisement in the newspapers aforementioned, at least thirty days previous, of the time and place, that an election will be held for the election of nine directors to manage the affairs of said company; and, at such time and place, each stockholder may attend in person, or vote by proxy for the directors aforesaid, giving one vote for each share of which he may be the owner, in that and all succeeding elections; and the directors thus elected shall elect one of their body president of the board, who shall, together with the other directors, continue in office until the first Monday in January ensuing, and until their successors are elected and duly qualified. Any three of the commissioners may act as judges of the first election, and none but a stockholder shall be eligible as a president or director.

Sec. 7. Be it enacted, That, to continue the succession of the president and directors of said company, nine directors shall be chosen annually on the first Monday in January, at such place as the board may designate by the stockholders; and the directors shall have power to appoint judges of elections. The president of the board shall be elected within three days after the board is organ-

ized. If any vacancy shall occur by death, resignation, or otherwise, the vacancy shall be filled by the board, and the persons thus appointed shall hold their office until the next annual election. All elections required to be made at a particular time and place, if not then and there made, may be made at any other time or place by giving the usual notice of thirty days, and the old officers shall continue to exercise their functions until their successors are duly elected and qualified.

Sec. 8. Be it enacted, That a general meeting of the stockholders shall be held annually at the time and place appointed for the election of president and directors, at which time and place it shall be the duty of the president and directors in office to exhibit a clear and detailed statement of the affairs of the company, and at such meetings a majority of the whole votes upon the stock shall be required to remove an officer, or to reverse decrees or acts of the directory.

Sec. 9. Be it enacted, That every officer of said company shall, previous to entering upon the duties of his office, take an oath or affirmation faithfully to discharge his duty according to the provisions of this act.

Sec. 10. Be it enacted, That if any of the six thousand shares shall remain unsubscribed for after the organization of said company, the board of directors shall have power to open the books for the sale of the balance of the stock, upon giving thirty days' notice of the time and place, and the subscribers of such stock shall have all the rights and privileges, and be subject to the same regulations of the original shareholders.

Sec. 11. Be it enacted, That said president and directors shall have power to appoint a cashier and all such officers, engineers, agents, or servants whatsoever deemed necessary for the transaction of the business of the company, and may remove any of them at pleasure; may fix the salary or compensation of such cashier, engineers, officers or servants in the employ of said company, and to

determine by their by-laws the manner of adjusting and settling all accounts against the company, and also the manner, effect, and evidence of transfer of stock in said company.

Sec. 12. Be it enacted, That if the capital stock of said company shall be found insufficient for the purposes of this act of incorporation, it shall and may be lawful for the president and directors, or a majority of them, from time to time, to increase said capital stock by an addition of shares to any amount, so that the whole capital shall not exceed one million five hundred thousand dollars, for which they may cause subscriptions to be received, giving notice in the manner hereinbefore prescribed, the purchasers of which shall stand in the same relation to the company as the original stockholders.

Sec. 13. Be it enacted, That the president and directors of said company shall be, and they are hereby, vested with all the powers and rights necessary for the building, constructing, and keeping in repair of a railroad from Knoxville, East Tennessee, through the Hiwassee district, to a point on the southern boundary of Tennessee, on the nearest, best, and most practicable route. The said road shall have as many tracks as may be deemed necessary by the board of directors, but shall not be more than two hundred feet wide, to which width the company may purchase and cause the same to be condemned for the use of said road, or any less breadth, at the discretion of the directory; and they may cause to be made, or contract with others for making of, said road or any part thereof; and they or their agents, or those with whom they may contract for making any part of said road, or their agents, may enter upon, use, and excavate any land which may be laid out for the site of said road, or the erection of warehouses, engine arbors, reservoirs, booths, stables, officer's and mechanics' shops, or other works necessary or useful in the construction and repair thereof or its works. They may fix scales and weights, build bridges, lay rails, make embankments and excavations, and may use any

earth, ground, rock, timber, or other material which may be wanted for the construction and repair of any part of said road, and may construct and acquire all necessary steam engines, cars, wagons, and carriages for transportation on said road by horse or steam power, and all necessary apparatus appertaining to the same.

Sec. 14. Be it enacted, That, whenever it shall become necessary, after said road is laid out, to subject the land of individuals, over which said road is laid out, to the use of said company, and, if the right of soil of the owner can not be had by gift or purchase, it shall be lawful for the president and directors, their agents, contractors, laborers, and servants, to enter upon such lands and proceed in the opening and constructing said railroad through the same. The pendency of any proceeding in court, or before arbitrators, assessors, or valuers, to estimate the damages that will be sustained by the owner or proprietor of said land by reason of opening said road, shall in no manner hinder or delay the progress of said work, and no order shall be made, nor shall any injunction or supersedeas be awarded by any judge or court to hinder or delay the progress of said work, the true intent of this act being that all injury that may be done to any land, without the consent of owners or proprietors thereof, by opening and constructing the railroad through the same, over and above the advantages of the road to the owners or proprietors of the lands, shall be fully and completely compensated for in damages, when ascertained, so that a work of great public utility may not be delayed by lawsuits.

Sec. 15. Be it enacted, That the president and directors of said company, their officers, servants, and agents, shall have full power and authority to enter upon all lands and tenements through which they may judge it necessary to make said road, and lay out the same according to their pleasure, so that neither the dwelling house, yard, garden, curtilage be invaded without consent of the owner or proprietor thereof; and if the company can not agree as to the value of the land, and the owner will not convey it

in fee, either party may apply to the circuit court of the county where the said land lies, by giving five days' notice if the owner of the land resides in the county, and twenty days' notice if he resides in any other county in this state, and by advertising in some newspaper printed in Knoxville, Athens, or Madisonville, if he resides out of the state, or be a body corporate, to appoint commissioners to assess the value and condemn the land for the use of said road; and the court shall appoint five disinterested freeholders of said county, and who shall be sworn or affirmed justly and impartially to value the lands, who shall ascertain what damage the owner will sustain, if any, by the location of said road over his land, always taking into consideration the benefit the road may be of to the owner, and the tendency said road will have to enhance the value of the land; and said five freeholders, any three of whom concurring, shall report to said court as soon as practicable the damages, if any, and if none are sustained they shall report the fact; which report, if unexcepted to, shall be recorded, and if any damages are assessed, the money shall be paid into court by the company. The fee simple of land, so valued as aforesaid, shall vest in said company; and the description of the land and the report of the commissioners, shall be made a matter of record, and, when registered, shall have the effect of a deed of conveyance in fee simple to the company; Provided, however, That when infants or persons non compos are owners of the land, the guardian shall be notified of said proceedings in court, and if there be no regular guardian, said court shall appoint some person well qualified to defend and protect the interest of such infant or nonsane person.

Sec. 16. Be it enacted, That the president and directors, for the purpose of making said road or repairing the same after it shall have been made, shall be at liberty, by themselves or agents, to enter upon any adjacent land, and cut, quarry, dig, take and carry away therefrom any timber, stone, gravel, or earth which may be necessary;

Provided, They shall not, without the consent of the owner, cut down any fruit tree or trees preserved in any inclosure for shade or ornament, or take any materials constituting any part of a fence or building. For all which materials under the authority of this act, and for all incidental injuries done to ground, wood, inclosure, or crops, in carrying them away, the said company shall make to the owner a reasonable compensation; and if the parties can not agree upon the price it shall be ascertained by three impartial free holders, to be appointed by a justice of the peace at the application of either party, the opposite party having three days' notice of the application to the justice. The three freeholders shall be sworn to do impartial justice between the parties. Their award shall be returned to the justice, and shall stand as an award made by order of court upon the rights of the parties, upon which the justice may enter judgment and issue execution if within his jurisdiction; if over, he shall certify the proceedings, as in other cases, to the next court, to be proceeded upon as an award made by order of said court; Provided, Either party may have the proceedings corrected by certiorari, and not by appeal; if the proceedings be quashed, the court may appoint other valuers, and cause justice to be done as contemplated before and by order of the court, quashing said proceedings.

Sec. 17. Be it enacted, That should said railroad pass over vacant and unappropriated lands, said company shall have the exclusive right of entering the land over which said road may be laid out, not exceeding two hundred feet in breadth, until the first day of January, 1839, and the entry taker of the district or county through which said road may be laid out shall not receive any entry within that period for the benefit of any other person or persons than said company, under the penalty of five thousand dollars, to be recovered by action of debt in any court having cognizance thereof, at the suit of said corporation: Provided, Said company shall notify the entry taker of the different counties through which said road may pass, of the route thereof.

Sec. 18. Be it enacted, That said railroad company shall have power to acquire and own, as common stock of said company, lands near and connected with said road, on which to erect warehouses, booths, arbors, stables, reservoirs, etc., for the purpose of constructing said road and keeping it in repair, and for the convenience of transportation and places of deposit, which improvements they are hereby authorized to construct. If the company cannot agree with the owners of the land necessary for the above purposes, they may have it condemned in the same manner as the land over which the road is laid out may be condemned by the fifteenth section of this act; Provided, That not more than five acres shall be taken at any one place except by agreement with the owners.

Sec. 19. Be it enacted, That the whole stock and property of said company, real, personal, and mixed, and the issued, profits, and proceeds thereof, shall be holden in law, and are hereby declared, to be personal property; and the same shall be governed by the rules and laws governing personal property in all cases, and the said property and the profits arising therefrom shall be vested in the respective shareholders, their heirs and executors, administrators and assigns, in the proportion of their respective shares, forever.

Sec. 20. Be it enacted, That whenever it shall become necessary, in the construction of said road, to cross or intersect any public road now or hereafter established by law, it shall be the duty of said company so to construct said road as not to impede the passage of transportation of persons or property along the same.

Sec. 21. Be it enacted, That when it shall be necessary to pass through the improved land of any individual, it shall be the duty of said company to provide such individual with a proper and suitable wagon way across said road from one part of his or her land to the other, if the same shall be required by said owner, at the time the route of said railroad (is) determined on, but the owner

of such land may, at any time after said railroad shall be opened and completed, construct and make such wagon way across the same at his or her own expense, under the supervision and direction of said company.

Sec. 22. Be it enacted, That if said company shall not begin the railroad contemplated by this act or contract for the construction of some part thereof, on or before the first day of January, 1838, and complete the same on or before the first day (of) January, 1844, the interest of said company in said road shall be forfeited and cease, and also all rights to take tolls.

Sec. 23. Be it enacted, That as soon as any section of five miles of said road shall be completed, the president and directors may transport all persons, produce, and commodities, such person or persons or owners of such produce or commodities first paying to said company or their agent the toll that may be demanded for that purpose. The capital stock of said company shall be forever exempt from taxation, and all their other property of every description situated within this state, including the road and rails, shall be exempt from taxation for and during the period of twenty years from the completion of said road and no longer.

Sec. 24. Be it enacted, That after said railroad shall be completed, or any five miles thereof, the president and directors shall on the first Monday in January and July in each and every year, declare and make such dividends of net profits, or the tolls herein granted, as may be advisable, to be divided among the proprietors.

Sec. 25. Be it enacted, That if any person shall willfully injure, impair or destroy any part of said road constructed under this act, or any of the necessary work, buildings, machines, wagons, cars, booths, reservoirs, bridges or viaducts, such person shall be subject to indictment, and, on conviction, shall be fined and imprisoned at the discretion of the court and jury, and shall moreover

be liable to an action of damages at the suit of said company in any court having cognizance thereof.

Sec. 26. Be it enacted, That said company shall be authorized to charge the following tolls, to wit: For every passenger, with not exceeding one hundred pounds of baggage, not exceeding six cents per mile; for every one hundred pounds of goods, wares, merchandise, or produce and commodities of every description, not exceeding one-half cent per mile on heavy articles, and ten cents per cubic foot on articles of measurement.

Sec. 27. Be it enacted, That full right and privilege is hereby reserved to the citizens of this state, or any company hereafter to be incorporated under the authority of this state, to connect with the road hereby provided for any other railroad or public improvement, provided no injury is done to the works made and created by said company hereby incorporated; *And provided also*, That the same shall not interfere with the privileges hereinbefore granted.

Sec. 28. Be it enacted, That if an amount of stock should not be subscribed sufficient to complete the whole work from Knoxville to the south boundary line of this state, as contemplated by this act, or if a majority of the board of directors should deem it advisable or expedient to begin the work at some point on the Big Tennessee River, and should complete the road from such point to the south boundary line of the State of Tennessee, the work may be considered as completed, anything in this act to the contrary notwithstanding. But the board of directors may, in their discretion, continue said road to Knoxville, should they begin the work at some other point.

ACT INCORPORATING NASHVILLE & CHATTANOOGA RAILROAD COMPANY.

Acts Tenn. 1845—6—*Chap.* 1.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That for the purpose of establishing a communication by railroad between Nashville and Chattanooga, the formation of a company is hereby authorized, which, when formed, shall be a body corporate, by the name and style of "The Nashville & Chattanooga Railroad Company," and by said corporate name shall be capable in law to buy, receive by gift, hold, sell, and convey real and personal estate, as hereinafter provided, make contracts, sue and be sued, to make by-laws, and to do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of the business for which it is incorporated, and to have and use a common seal, and the same to alter and destroy at its pleasure, and shall have perpetual succession of members.

Sec. 2. Books for subscription of sixty thousand shares of the capital stock of said company, of twenty-five dollars each, shall be opened on the first Monday in January, 1846, and shall be kept open for six days, between the hours of 10 o'clock in the morning and 4 o'clock in the evening of each of those days, at the following places and by the following commissioners, to wit:

At Nashville, by James Overton, John M. Hill, George W. Martin, Thomas Washington, John Shelby, Godfrey M. Fogg, John W. Walker, Jacob McGavock, J. Hugh Smith, W. W. Woodfolk, A. W. Vanleer, Samuel Watkins, Thomas Wells, John Thompson, Joseph B. Knowles, James Erwin, Felix R. Rains, Pleasant Smith, J. J. Gill, John Nichol, West H. Humphreys, R. J. Meigs, A. V. S. Lindsley, Alexander Allison and Robert I. Moore.

At Gallatin, by James A. Blakmore, Elijah Boddie, Henry B. Vaughn, Daniel S. Donelson, S. R. Anderson, and William M. Blakemore.

At Shelbyville, by Robert Matthews, George Davidson, Thomas Dean, John Eakin, and W. C. Swanson.

At Gainsborough, by Thomas L. Bransford, Watson M. Cooke, Samuel E. Hare, and Richard P. Brooks.

At Lebanon, by Paulding Anderson, R. L. Caruthers, and Calvin Jackson.

At McMinnville, by George R. Smartt, William Black, Jesse Locke, Philip Hoodenpyl, and L. D. Mercer.

At Franklin, by Thomas Parks, William Park, Nicholas Perkins, Samuel Crockett, and Robert C. Foster.

At Murfreesboro, by Charles Ready, Edwin A. Keeble, Harman Spence, Lewis Garner, and L. H. Carney.

At Sparta, by James Snodgrass, John Warren, and William M. Young.

At Fayetteville, by John Clark, Jr., John M. Bright, Robert Farguharson, William T. Ross, James Fulton, and William Bonner.

At Pulaski, by Andrew M. Ballentine, Thomas Martin, and Benjamin Carter.

At Winchester, by Benjamin Dechard, Mark Hutchins, James Harris, James Sharp, Thomas Wilson, and C. C. Garner.

At Chattanooga, by Robert M. Hook, Benjamin Chandler, and John P. Long.

At Jasper, by Jackson Pryor, Daniel R. Rawlings, and John Harriford.

At Lewisburg, by Benj. Williams, Ephraim Hunter, James V. Ewing, Morgan Fitzpatrick, and Henry Harding.

Sec. 3. The said commissioners, or a majority of them, at each of the places aforesaid, shall receive subscription for stock in the said railroad company during the time the said books are directed to be kept open, and on each share

so subscribed shall demand and receive the sum of fifty cents, without which the subscription shall be void.

Sec. 4. As soon as the time for receiving subscriptions as aforesaid shall have expired, the said commissioners shall, respectively, deposit all the money so received by them in some incorporated bank, redeeming its notes in specie, to the credit of the Nashville & Chattanooga Railroad Company, and subject to the order of the president of the board of commissioners hereinafter appointed, and shall also forward a correct list of all the subscribers to the said stock, with the number of shares each subscriber has taken, to a board of commissioners, to be composed of the following persons: Jno. M. Bass, Jno. M. Hill, Francis B. Fogg, Andrew Ewing, A. O. P. Nicholson, V. K. Stevenson, Jno. Bell, Willoughby Williams, William Nichol, S. D. Morgan, Jos. T. Elliston, Jos. W. Horton, Jas. A. Porter, Jas. Overton, and Jno. Shelby, who may establish rules to govern their proceedings, choose their own president, and appoint such other officers and agents as they may think proper, and prescribe their duties, and who, or a majority of whom, shall meet at Nashville on the third Monday in January next, ascertain the whole number of shares taken in the said company, and publish the same in some newspaper printed in Nashville, on or before the fourth Monday in January next; and, if the number of four thousand shares shall have been subscribed, on each of which there shall have been paid the sum of fifty cents, the Nashville & Chattanooga Railroad Company shall be regarded as formed, and thenceforth and from the day of the closing of the books of subscription, as aforesaid, the said subscribers to the stock shall form a body politic and corporate indeed and in law, by the name and for the purpose aforesaid, and in all things to be represented by the board of commissioners aforesaid, until the election of a board of directors, as hereinafter prescribed.

Sec. 5. If on closing the books aforesaid the number of four thousand shares shall not have been subscribed, then

and in that case the said board of commissioners, by themselves or their agents, may receive subscriptions till the number of four thousand shares be taken, and whenever that number of shares shall be subscribed, the company shall be considered as formed, as having a corporate existence, as aforesaid, and of which notice shall be given, as hereinbefore directed, and may proceed to survey the route for the road, and make an estimate of the cost of its construction. Nevertheless, no conclusive and binding location of the road shall be made by the board of commissioners, but the same be left to the determination of the first board of directors chosen by the stockholders. And the said board of commissioners may, by themselves or their agents, at such time and places as they may think proper, and upon such terms as to time and manner of payment as they may deem expedient, receive additional subscriptions until the number of forty thousand shares shall have been subscribed, upon which the company may be formed, and the subscribers shall thenceforth form a body corporate, as aforesaid; *Provided*, The same shall be done on or before the first day of January, 1848; and for the residue of the original number of sixty thousand shares the said corporation, when organized, may in like manner receive additional subscriptions.

Sec. 6. In case more than sixty thousand shares shall have been subscribed on closing the books when they are first opened, the shares shall be reduced to that number by deducting the surplus shares from the highest subscribers, placing them on an equality of numbers, as far as can be done; and, after such reduction, the holders of the remaining shares shall form the company, and be interested therein in proportion to the number of shares which they may then respectively hold.

Sec. 7. If, on closing the books on the first day of January, 1848, the number of forty thousand shares shall not have been subscribed, the money paid by each subscriber shall be returned to him by the said board of commissioners, after defraying the expenses of opening the books

and making a survey and map of the route, and estimate of the cost of the road, which the said commissioners are hereby authorized to have made as soon as practicable.

Sec. 8. The affairs of said company shall be managed by a board of directors, to consist of fifteen, who shall be chosen by the stockholders from their own body, and a president of the company shall be elected by the directors from among their own members, in such manner as the regulations of the corporation shall prescribe.

Sec. 9. As soon as the number of forty thousand shares shall have been subscribed, it shall be the duty of the commissioners appointed to declare the same, to appoint a time for the stockholders to meet in Nashville, and give notice thereof by publication in some of the newspapers of Nashville, at which time and place the said stockholders, in person or by proxy, shall proceed to elect the directors of the company, and to enact all such regulations rules, and by-laws as may be necessary for the government of the corporation and the transaction of its business. The persons elected directors at this meeting shall serve for such period, not exceeding one year, as the stockholders may direct; and at this meeting the stockholders shall fix on the day and place or places where the subsequent election of directors shall be held; and such elections shall thenceforth be annually made. But if the day of annual election should pass without any election of directors, the corporation shall not thereby be dissolved, but it shall be lawful on any other day to hold and make such elections in such manner as may be prescribed by a by-law of the corporation.

Sec. 10. The board of directors may fill up all vacancies which may occur in it during the period for which their board shall have been elected, and, in the absence of the president may fill his place by electing a president pro tempore.

Sec. 11. All contracts and agreements authenticated by the president of the board shall be binding on the com-

pany without seal, or such other mode of authentication may be used as the company, by their by-laws, may adopt.

Sec. 12. The board of directors shall not exceed, in their contracts, the amount of the capital of the corporation, and of the funds which the company may have borrowed and placed at the disposal of the board; and in case they should do so, the president and directors who may be present at the meeting at which such contract or contracts so exceeding the amount aforesaid shall be made, shall be jointly and severally liable for the excess, both to the contractor or contractors and the corporation; Provided, That any one may discharge himself from such liability by voting against such contract or contracts, and causing such vote to be recorded on the minutes of the board, and giving notice thereof to the next general meeting of the stockholders.

Sec. 13. After the route of such railroad shall have been accurately surveyed and adopted, and a plat thereof deposited in the office of the secretary of state, it shall not be lawful for any other railroad to be built, cut, or constructed, in any way or manner, or by any authority whatever, running laterally within twenty miles of the route so adopted, unless by said company, or with the consent of the board of directors thereof for the time being.

Sec. 14. The said company shall have the exclusive right of transportation or conveyance of persons, goods, merchandise, and produce over the said railroad by them to be constructed; Provided, That the charge of transportation or conveyance shall not exceed thirty-five cents per one hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every hundred miles, and five cents a mile for every passenger; And provided also, That the said company may, when they see fit, farm out their rights of transportation on said road subject to the rates above mentioned.

Sec. 15. The board of directors may call for the payment of twenty-four and a half dollars on each share of

stock, in sums not exceeding two dollars, in every thirty days; Provided, That twenty days' notice be given of such call in at least one public newspaper of the State in which any of the stockholders may reside; and a failure to pay, or secure to be paid, according to the rules of the company, any of the installments so called as aforesaid, shall induce a forfeiture of the share or shares on which default shall be so made, and all payments thereon, and the same shall vest in and belong to the company, and may be restored to the owner or owners by the board of directors, if they deem proper, on the payment of all arrears on such shares, and legal interest thereon, or the directors may waive the forfeiture after thirty days' default, and sue the stockholders for the installment due, at their discretion.

Sec. 16. The stock of said company may be transferred in such manner and form as may be directed by the by-laws of the said corporation.

Sec. 17. The said company may at any time increase its capital to a sum sufficient to complete the said road and stock it with everything necessary to give it full operation and effect, either by opening books for new stock, or by selling such new stock, or by borrowing money on the credit of the company, and on the mortgage of its charter and works; and the manner in which the same shall be done in either case shall be prescribed by the stockholders at a general meeting; and any state, or any citizen, corporation, or company, of this or any other state or country, may subscribe for and hold stock in said company, with all the rights and subject to all the liabilities of any other stockholder.

Sec. 18. The board of directors shall, once in every year at least, make a full report on the state of the company and its affairs to a general meeting of the stockholders, and oftener if directed by a by-law; and shall have power to call a general meeting of the stockholders when the board may deem it expedient.

Sec. 19. No person but a citizen of the United States, being a bona fide stockholder in his own right of at least forty shares, which he shall have held at least three-months previous to his election (except at the first election), shall be president or a director of the company; nor shall any stockholder vote, in person or by proxy, at any general or other election (except the first), who shall not have held, in his own right, the shares on which he offers to vote at least three months previous to such election.

Sec. 20. Stockholders may vote in person or by proxy and in the election of directors, and, in voting on all questions which come before a meeting of the stockholders, or which may be submitted to the decision of the stockholders in any other manner, the vote shall be taken according to the following scale: The owner of one or two shares shall be entitled to one vote; the owner of not less than three nor more than four shares shall be entitled to two votes; the owner of not less than five nor more than six shares shall be entitled to three votes; the owner of not less than seven nor more than eight shares, to four votes; the owner of not less than nine nor more than eleven shares, to five votes; the owner of not less than twelve nor more than fifteen shares, to six votes; the owner of not less than sixteen nor more than twenty shares, to seven votes; the owner of not less than twenty-one nor more than twenty-six shares, to eight votes; the owner of not less than twenty-seven shares nor more than thirty-three, to nine votes; the owner of not less than thirty-four nor more than forty shares, to ten votes; and the owner of every ten shares above forty shall be entitled therefor to one vote; Provided, That no individual, corporation, or company shall be entitled to more than five hundred votes.

Sec. 21. The said company may purchase, have, and hold in fee, or for a term of years, any lands, tenements, hereditaments which may be necessary for said road, or appurtenances thereof, or for the erection of depositories, storehouses, houses for the officers, servants, or agents

of the company, or for workshops or foundries to be used for the said company, or for procuring timber, stones, or other materials necessary for the construction of the road or its appurtenances, or for effecting transportation thereon.

Sec. 22. The said company shall have the right, when necessary, to construct the road, or any branch thereof, across or along any public road or water course; Provided, That the said road and the navigation of such water course shall not be thereby obstructed; And provided further, That such railroad shall not be located so near any turnpike road as to injure or prejudice the interests of the stockholders in such turnpike road, except upon such terms as may be agreed upon by the president and directors of the same on behalf of the stockholders.

Sec. 23. The said company may purchase, have, and hold any bridge or turnpike road over which it may be necessary to carry the said railroad; and when such purchase is made, to hold the said bridge or turnpike road on the same terms and with all the rights which belong to the individual, individuals, or corporation from which such purchase may be made; Provided, That the said company shall not obstruct any public road without constructing another as convenient as may be.

Sec. 24. Where any lands or rights of way may be required by the said company for the purpose of constructing their road, and for want of agreement as to the value thereof, or from any other cause the same can not be purchased from the owner or owners, the same may be taken at a valuation to be made by five commissioners, or a majority of them, to be appointed by the circuit court of the county where some part of the land or right of way is situated; and the said commissioners, before they act, shall severally take an oath, before some justice of the peace, faithfully and impartially to discharge the duty assigned them. In making the said valuation, the commissioners shall take into consideration the loss or damage

which may occur to the owner or owners in consequence of the land being taken or the right of way surrendered, and also the benefit and advantage he, she, or they may receive from the erection or establishment of the railroad or works, and shall state particularly the nature and amount of each, and the excess of loss and damage over and above the benefit and advantage shall form the measure of valuation of the said land or right of way. The proceedings of the said commissioners, accompanied with a full description of the said land or right of way, shall be returned under the hands and seals ofa majority of the commissioners, to the court from which the commission issued, there to remain of record. In case either party to the proceeding shall appeal from the valuation to the next session of the court granting the commission, and give reasonable notice to the opposite party of such appeal, the court shall order a new valuation to be made by a jury, who shall be charged therewith in the same term, or as soon as practicable, and their verdict shall be final and conclusive between the parties, unless a new trial shall be granted; and the lands or right of way so valued by the commissioners or jury shall vest in the said company in fee simple so soon as the valuation may be paid, or, when refused, may be tendered. Where there may be an appeal, as aforesaid, from the valuation of commissioners by either of the parties, the same shall not prevent the works intended to be constructed from proceeding; but where the appeal is by the company requiring the surrender, they shall be at liberty to proceed in their works only on condition of giving to the opposite party a bond, with good security, to be approved by the clerk of the court where the valuation is returned, in a penalty equal to double the said valuation, conditioned for the payment of said valuation and interest in case the same be sustained; and, in case it be reversed, for the payment of the valuation thereafter to be made by the jury and confirmed by the court; Provided, That when the land cannot be had by gift or purchase the operations of the work are not to be hindered or delayed during the penden-

cy of any proceedings to assess its value, as aforesaid, nor shall any injunction or supersedeas be awarded by any judge or court to delay the progress of said work.

Sec. 25. In the absence of any contract with the said company in relation to land through which the said road may pass, signed by the owner thereof, or by his agent, or any claimant or person in possession thereof, which may be confirmed by the owner, it shall be presumed that the land upon which the said road may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to the company by the owner thereof, and the company shall have good right and title thereto, and shall have, hold, and enjoy the same as long as the same be used only for the purposes of the road, and no longer, unless the person or persons owning the said land at the time that part of the road which may be on said land was finished, or those claiming under him, her, or them, shall apply for an assessment for the value of said lands, as hereinbefore directed, within five years next after that part of said road was finished, and in case the said owner or owners, or those claiming under him, her, or them, shall not apply for such assessment within five years next after the said part was finished, he, she, or they shall be forever barred from recovering the said land, or having any assessment or compensation therefor: Provided, Nothing herein contained shall effect the right of *feme covert* or infants until two years after the removal of their respective disabilities.

Sec. 26. If any person shall intrude upon the said railroad, or any part thereof, by any manner of use thereof, or of the rights and privileges connected therewith, without the permission, or contrary to the will of said company, he, she, or they shall forthwith forfeit to the said company all the vehicles that may be so intruded on said road, and the same may be recovered by suit at law and the person or persons so intruding may also be indicted for misdemeanor, and, upon conviction, fined and imprisoned by any court of competent jurisdiction.

Sec. 27. If any person shall willfully and maliciously destroy or in any manner hurt, damage, or obstruct the said railroad, or any bridge, or any vehicle used for or in the transportation thereon, such person or persons so offending shall be liable to be indicted therefor, and, on conviction, shall be imprisoned not more than six nor less than one month, and pay a fine not less than twenty dollars; and shall be further liable to pay all the expenses of repairing the same; and it shall not be competent for any person so offending against the provisions of this clause to defend himself by pleading or giving in evidence that he was the owner, or agent or servant of the owner, of the land where such destruction, hurt, damage, injury, or obstruction was done or caused, at the time the same was caused or done.

Sec. 28. Every obstruction to the safe and free passage of vehicles on the said road shall be deemed a public nuisance, and may be abated as such by an officer, agent, or servant of the company, and the person causing such obstruction may be indicted and punished for erecting a public nuisance.

Sec. 29. The said company shall have the right to take at the storehouses they may establish or annex to their railroad all goods, wares, merchandise, and produce intended for transportation; prescribe the rules of priority, and charge and receive such just and reasonable compensation for storage as they, by rules, may establish (which they shall cause to be published), or as may be fixed by agreement with owner, which may be distinct from the rates of transportation; *Provided*, That the said company shall not charge or receive storage on goods, wares, merchandise, or produce which may be delivered to them at their regular depositories for immediate transportation, and which the company may have the power of transporting immediately.

Sec. 30. The profits of the company, or so much thereof as the board of directors may deem advisable, shall, when

the affairs of the company will permit, be semiannually divided among the stockholders in proportion to the stock each may hold.

Sec. 31. The said company is hereby expressly prohibited from carrying on any banking operations, but may effect insurance on lives and property transported on the road.

Sec. 32. Whenever, in the construction of said road, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the company to construct said road across such established road or way so as not to impede the passage or transportation of persons or property along the same; or where it shall be necessary to pass through the land of any individual, it shall be their duty to provide for such individual a proper wagon way or ways across said road from one part of his land to the other.

Sec. 33. The said company shall possess such additional powers as may be convenient for the due and successful execution of the powers granted in this charter, and for the successful construction and management of the work.

Sec. 34. This charter shall be amendable from time to time by the legislature, whenever the president and directors shall unanimously petition for amendments, specifying in the petition the nature of such amendments; and, when such amendments shall be adopted by the legislature and submitted to the directory, and be accepted and adopted unanimously by the president and directors, they shall be obligatory on the stockholders, and not otherwise.

Sec. 35. The president, directors, clerks, agents, officers, and servants of said company shall be exempt from military duty, except in cases of invasion or insurrection, and shall also be exempt from serving on juries and working on public roads.

Sec. 36. The company shall have full power and authority to purchase and own such number of slaves as may be necessary for the construction of said road, and for keeping the same in repair.

Sec. 37. If, by decree or otherwise, the said corporation shall be dissolved, the president and directors of said company are created trustees, with such powers only as may be necessary to collect the debts due the company, preserve the property, pay the debts, and distribute the property and effects of the company to those who may be entitled thereto under charter.

Sec. 38. The capital stock of the said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including the workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer.

Sec. 39. The railroad authorized by this act shall be commenced within three years after the passage of this act, and shall be finished within six years thereafter; otherwise the charter hereby granted shall be void.

Sec. 40. Any individual or individuals, company or body corporate, with permission of the legislature of this state, may hereafter construct branches to unite with the said Nashville & Chattanooga Railroad; and it shall be the duty of said company, when required, to receive on their road the full loaded freight cars from such branches, and transport the same to their destination, and to return them without charging the loads thereof, or charging for the transportation of the goods, wares, merchandise, and produce therein any greater rate of freight than they charge for similar goods, wares, merchandise, and produce in their own cars; *Provided*, That the company shall not be compelled to receive such cars on their road unless they are constructed in the same manner and are of equal strength with their own cars, of which the engineer of the

main road shall be the judge; *And Provided,* That the company shall not be required to receive any cars from such branches without receiving payment for at least twenty miles transportation; *And provided also,* That the said company shall be entitled, in all respects, to similar and equal privileges on any branches constructed to unite with their road, subject to the same restraints.

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No. 21 Original

JAN 14 1924

WM. R. STANSBURY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

STATE OF GEORGIA,

vs.

CITY OF CHATTANOOGA.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR THE STATE OF GEORGIA.

ROBERT H. WILLIAM,
WILLIAM H. FREEMAN,
JOE V. WILLIAMS,
Counsel.

STATE OF GEORGIA
By GEORGE M. NAPIER,
Attorney General.

JANUARY, 1924.

No. 26—Original

In the United States Supreme Court.

STATE OF GEORGIA

versus

CITY OF CHATTANOOGA

MOTION IN BEHALF OF PLAINTIFF FOR LEAVE TO FILE SUPPLEMENTAL BRIEF.

SUPPLEMENTAL BRIEF.

Now comes the State of Georgia, by its Attorney General, George M. Napier, and moves the Court for leave to file supplemental brief herein, to be considered on defendant's motion to dismiss.

STATE OF GEORGIA,
By GEORGE M. NAPIER,
Attorney General.

ROBERT H. WILLIAMS,
WILLIAM H. FRIERSON,
JOE V. WILLIAMS,
Counsel.

Receipt of copy of the above motion and also copy of the supplemental brief in behalf of plaintiff duly acknowledged, and the defendant hereby waives formal service of such notice and consents to the filing of such supplemental brief.

CITY OF CHATTANOOGA,
By SAMUEL E. WHITAKER,
Attorney.

No. 26—Original

In the United States Supreme Court.

STATE OF GEORGIA

versus

CITY OF CHATTANOOGA

SUPPLEMENTAL BRIEF FOR PLAINTIFF

MAY IT PLEASE THE HONORABLE COURT:

1. It was suggested in oral argument that in *Bank of the United States v. Planters Bank of Georgia*, 9 Wheat., 904, Chief Justice Marshall had held that when a State or the Government becomes a partner in a commercial transaction, it devests itself of its sovereign character, and takes that of a private citizen.

That case involved a suit against a corporate entity,—it was not a proceeding against the State directly,—that is, the State was not in fact a party defendant, nor was it a necessary party. Nor was it a proceeding *in rem* against property owned directly by the State.

In that case the State of Georgia, in its sovereign capacity, had incorporated the Planters Bank of Georgia. At the same time the State of Georgia, having an interest in the Bank through stock ownership, was one of the corporators. While being one of the corporators the State in granting the charter specifically and deliberately au-

thorized the corporation,—not the State,—to sue and be sued.

This is an entirely different case from the one now before the Court, where there has never been any corporation or organization of any kind of character. The property sought to be condemned is owned directly by the State, paid for from the funds in the State treasury collected by taxing the people under its sovereign power.

It may well be assumed that the decision of this Honorable Court in Bank of the United States v. Planters of Georgia, *supra*, determined the policy of the State of Georgia in constructing and operating the Western & Atlantic Railroad directly in its sovereign capacity, without resort to incorporation.

There is nothing in either *United States v. Strang*, 254 U. S., 491, or *Sloan Shipyards v. U. S. Fleet Corporation*, 258 U. S., 549, inconsistent with the plaintiff's insistence here.

A different situation is presented here than existed in the case with which Chief Justice Marshall had to pass upon.

The Western & Atlantic Railroad is not a corporate body. There is not now nor ever has been any organization, any stock, any of the incidents of private business. This is merely the name the State of Georgia has given the property, and the State's ownership and control can be exercised alone by virtue of the State's sovereignty.

As pointed out by Judge Story, in his Commentaries on the Constitution (Vol. 2, sec. 1687, 4th ed.), the above

reasoning of Chief Justice Marshall was on the ground that "a corporation is itself, in legal contemplation, an artificial person having a distinct and independent existence from that of the persons composing it," and, as an illustration, stated that a State which has stock in such banking corporation may, nevertheless, sue it just as any other stockholder may sue the same bank.

However,, in *Ballaine v. Alaska Northern Ry. Co.*, 259 Federal, 183 (9th Cir. Ct. Ap.), the court held that even if the government owns and operates a railroad by means of a corporate body, it can nevertheless claim its immunity from suit. The court said:

> "To overcome the application of the rule, plaintiff in error argues that in the operation and maintenance of the railroad the United States is carrying on a commercial business, and in such business has, to an extent, abandoned its sovereign capacity. We cannot uphold that view. Congress, in its power to regulate commerce, could construct, or could authorize a corporation or individuals to construct, a railroad, or to buy a railroad, and clearly in the territories has a plenary power to grant franchises, to create a railroad system, and to employ the agency of a corporation as a means of accomplishing such objects. California v. Pacific Railroad Co., 127 U. S., 1, 39, 8 Sup. Ct., 1073, 32 L. Ed., 150. In Luxton v. North River Bridge Co., 153 U. S., 525, 14 Sup. Ct., 891, 38 L. Ed., 808, the court held that Congress could create corporations as appropriate means of executing the powers of government, as, for instance, a railroad corporation, for the purpose of promoting commerce among the states. Indiana v. United States, 148 U. S., 148, 13 Sup. Ct., 564, 37 L. Ed., 401." . . .
>
> "Taking all these provisions together, they plainly

show that the United States, in acquiring stocks and bonds and property of the Alaska Northern Railway Company, acted in its sovereign capacity, and in exercising entire control, possession, ownership, and management, has merely employed the corporate organization as an agency through which to execute the purposes of the statute." (259 Fed., 185.)

A sovereign, even in the exercise of a business ordinarily performed by individuals or private corporations, need not consent to suit, or it may consent to suit subject to any limitations, reasonable or unreasonable, that it may impose. Missouri Pacific v. Ault, 256 U. S., 563-4; Alabama & Vicksburg Ry. Co., et al., v. Journey, 257 U. S., 111; James C. Davis, as Agent, etc., v M. C. Slocomb, decided by this Court November 12, 1923. In cases involving municipalities, there has been a distinction drawn between liability for acts performed in a governmental capacity and those performed in a proprietary capacity. However, there is no such distinction where there exists complete sovereignty as in the case at bar.

Mr. Justice Bradley says, in Hans v. Louisiana, 134 U. S., 1:

> "The suability of a State without its consent was a thing unknown to the law. It has been so often laid down and acknowledged by the courts and jurists that it is hardly necessary to be formally asserted."

The case of *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S., 446, was a suit by a citizen of Virginia against the Governor and Treasurer of the State of Georgia, the Railroad Company, certain of its Directors, and other citizens of the State. The State of Georgia had indorsed bonds of the Railroad Company, and default

having been made in the paymet of interest thereon, the road was placed in the hands of a receiver at the instance of the State, and was subsequently sold, the State becoming the purchaser. The holders of second mortgage bonds, issued after the State's indorsement, but prior to default, filed a bill to foreclose their mortgage and to set aside the sale to the State. To this bill the State officials demurred on the ground that the suit was substantially against the State, which could not be sued without its consent. The Court held that the State was an indispensable party and the bill was dismissed. Mr. Justice Miller spoke for the Court, and said at page 451:

> "It may be accepted as a point of departure unquestioned that neither the State nor the United States can be sued as defendant in any court in this country, without their consent, except in the limited class of cases in which the State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this Court by the Constitution."

It will be observed that in this case the State became owner of the road only to protect itself against its indorsement of the Company's bonds. If it could not be sued with respect to the property so held, certainly it is exempt from suits directly against it seeking to subject the property of its railroad constructed with State funds and as a great public work.

A case somewhat similar to the *Cunningham case* is that of Christian v. Atlanta & N. C. R. R. Co., 133 U. S., 233, in which it was declared that the State is an indispensable party to any proceeding in equity in which its

property is sought to be subjected; and that in such cases the suit could not be maintained.

In affirming the judgment of the court below, Mr. Justice Bradley said that it was "for the very plain reason that in such a case the State is a necessary party and cannot be sued."

The defendant does not contend that the State of Georgia has given its consent, express or otherwise, to be sued in the Courts of Tennessee.

It has been held by the appellate court of Georgia that the lands which Georgia owns in that State, and upon which the system of railroad here involved is partly located, can not be condemned for right-of-way for telegraph poles. Western & Atlantic R. R. Co., v. Western Union Telegraph Co., 138 Ga., 420, and Western Union Telegraph Co. v. Western & Atlantic R. R. Co., 142 Ga., 532. As pointed out at page 534 in the opinion in the latter case, there is no legislative intent shown in the eminent domain statutes of Georgia that they shall apply to the lands owned by the State, and that, "According to well-established canons of construction, the statute providing how condemnation proceedings shall be conducted when private property is taken or damaged for a public use can have no application to the State's property."

2. In *Tappan v. Western & Atlantic Railroad,* 71 Tenn., 106-113, the Supreme Court of Tennessee specifically held that the property belonging to the State of Georgia constituting a part of the Western & Atlantic Railroad could not be attached to pay an obligation created in the operation of the Western & Atlantic Railroad. The Court said:

> "It is hardly necessary to cite authorities in support of the proposition that a State of this Union is as to any other State a foreign and independent government, whether sovereign in the fullest sense of the term, we do not stop to inquire. No State can be sued in its own courts, except by its consent, and certainly cannot be impleaded in a foreign State against its consent. These are axiomatic principles of jurisprudence about which there can be no doubt or debate." (71 Tenn., 113.)

To the same effect is *State v. Bank of Tennessee*, 62 Tenn., 395.

In *Moore v. Tate*, 87 Tenn., 729, the Supreme Court of Tennessee held that "while a sovereign State may bring and maintain a suit as any other suitor, she cannot be sued in her own or a foreign court unless she has signified her consent thereto, either by statute or by some other unequivocal means," and at page 35, the Court said:

> "But apart from such selfish considerations, it is sufficient to say that it is without exception, so far as we know, that the courts of one State in dealing with a sister State extend to it all the privileges enjoyed by the State in which the Court is held, unless there be some imperative rule of law to the contrary."

Under the decisions of the Highest Court of Tennessee, therefore, the State of Georgia occupies the same status as a suitor in the Tennessee courts as Tennessee itself.

It has been suggested that the restrictions upon the power of eminent domain as is sought by the bill in the case at bar might bring about a wholly impossible situation. Suppose, it is argued, that the State of Georgia ac-

quired enormous tracts of land within the State of Tennessess. Is the exercise of the power of eminent domain by the State of Tennessee, which is as complete a sovereign as the State of Georgia, to be limited on that account? The answer is obvious:

(a) The State of Tennessee is not itself undertaking to condemn the property of the State of Georgia. The State of Tennessee has conferred upon the City of Chattanooga no special power to acquire property by condemnation. Indeed, it is only granted those general powers granted likewise to all public service corporations. What the State of Tennessee itself could do, what the State of Tennessee by amendment to the charter of the City of Chattanooga might authorize to be done, is not involved in the case at bar. *Whatever rights the State of Tennessee itself might have in the premises, it has not seen fit to delegate these to the city of Chattanooga.*

(b) The State of Tennessee, when it permitted the State of Georgia in her sovereign capacity to enter the territorial limits of the State of Tennessee for the purpose of engaging in the railroad business, had within its power to impose such limitations and conditions as it desired. It might have provided, as a condition precedent to the right of entry, that the State of Georgia would expressly consent to be sued in all matters relating to the operation of its railroad. The fact seems to be that the anxiety of the people of the State to promote the construction and operation of this railroad was so great that their representatives constituting the legislature of the State of Tennessee either overlooked the wise precaution above suggested, or else deliberately ignored it as an additional incentive to the construction of the road.

Unquestionably, the State of Tennessee might initially have required the State of Georgia to consent to suit in the operation of the Western & Atlantic Railroad, but it did not do so.

3. The City of Chattanooga seeks to condemn plaintiff's property under the general eminent domain statute of Tennessee. There is no pretense that the City is proceeding under any express legislative authority.

The right of the Federal Government to take for national uses property devoted to the public use of the State is, of course, paramount, and such property may be taken if its importance is trivial to the State but necessary for the government. (New Orleans v: United States, 10 Pet., 662, Nahant v. United States, 136 Federal, 273, and United States v. Boston Electric Ry. Co., 176 Federal, 963.) But even in circumstances like this, there is some doubt if lands held by a State for a public way can be taken by the government without express authority from Congress. United States v. Certain Lands in New Castle, 165 Federal, 783.

In that case Circuit Judge Putnam said:

> "There is also a serious question whether property already lawfully taken and held for the uses of the State as a public way can be taken for the uses of The United States without express authority therefor. Of course, defense against a public enemy is of a higher character than the matter of going and coming on foot or with teams, so that it cannot be denied that the United States would have a right to take public ways for the purposes of fortification. The difficulty arises out of the question whether such a right can be inferred from mere general phraseology like that of the act of August 18, 1890. It

would be unreasonable to assume that Congress intended that federal officials should assert jurisdiction to interfere with the public purposes of sovereign States without express authority therefor. The presumption is that authorized public uses are not to be interfered with under mere general terms of federal or state legislation. The trend of the authorities would seem to show that, with reference to the present case, something more than the general phraseology of the Act of August 18, 1890, is required before public ways can be closed by the Secretary of the Treasury or under his direction. As we cannot on this record determine the questions which the town of New Castle has brought to our attention by its briefs, we will only refer to this topic to Lewis' Eminent Domain (2 ed.) Secs. 272 and 272a, and the notes referred to therein, and to the reasoning and authorities appearing in Old Colony Railroad Co., v. Framingham Water Co., 153 Mass., 561, 563, 27 N. E. 662, 13, L. R. A., 332, and in Easthampton v. County Commissioners of Hampshire, 154 Mass., 424, 425, 28 N. E., 298, 13 L. R. A., 157, and sequences." (165 Fed., 788.)

Property held by a railroad for existing public use, or for the purpose of meeting a future public use reasonably to be anticipated, cannot be condemned by a municipality or other public service corporation unless the legislature gives clear and express authority for so doing. Railroad v. Union City, 137 Tenn., 495; Railroad v. Memphis, 126 Tenn., 267; Railroad v. Cemetery, 116 Tenn., 400; Railroad v. Railway, 116 Tenn., 500, 12 A. L. R., p. 1502, 15 Cyc, 614.

4. The question was asked during oral argument whether or not a State, by its course of conduct, might impliedly consent to be sued.

We can find no authority for such position. This contention, however, was made in Saranac L. & T. Co. v. Roberts, 195 N. Y., 303, 320, and in disposing of the point the Court said:

> "That no action can be maintained against the government, state, or Federal, except by its consent, express and not implied, and to be found in some special statute, is elementary law and it is settled upon authority that where, in reality, the suit against a State officer is a suit against the State itself, it cannot be maintained. If the suit against the officer, or the agent, of a State is based upon his illegal acts, or to recover property illegally possed by him, the rule is otherwise. (Upon these propositions, see People v. Dennison, 84 N. W., 272, 281; Sanders v. Saxton, 182 ib. 477; Louisiana v. Jumel, 107 U. S., 711; Davis v. Gray, 16 Wall, 203." (195 N. Y., 320, 321.)

Respectfully submitted,

STATE OF GEORGIA,
By GEORGE M. NAPIER,
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ROBERT H. WILLIAMS,
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IN THE

Supreme Court of the United States

No. [redacted]21 ORIGINAL

STATE OF GEORGIA

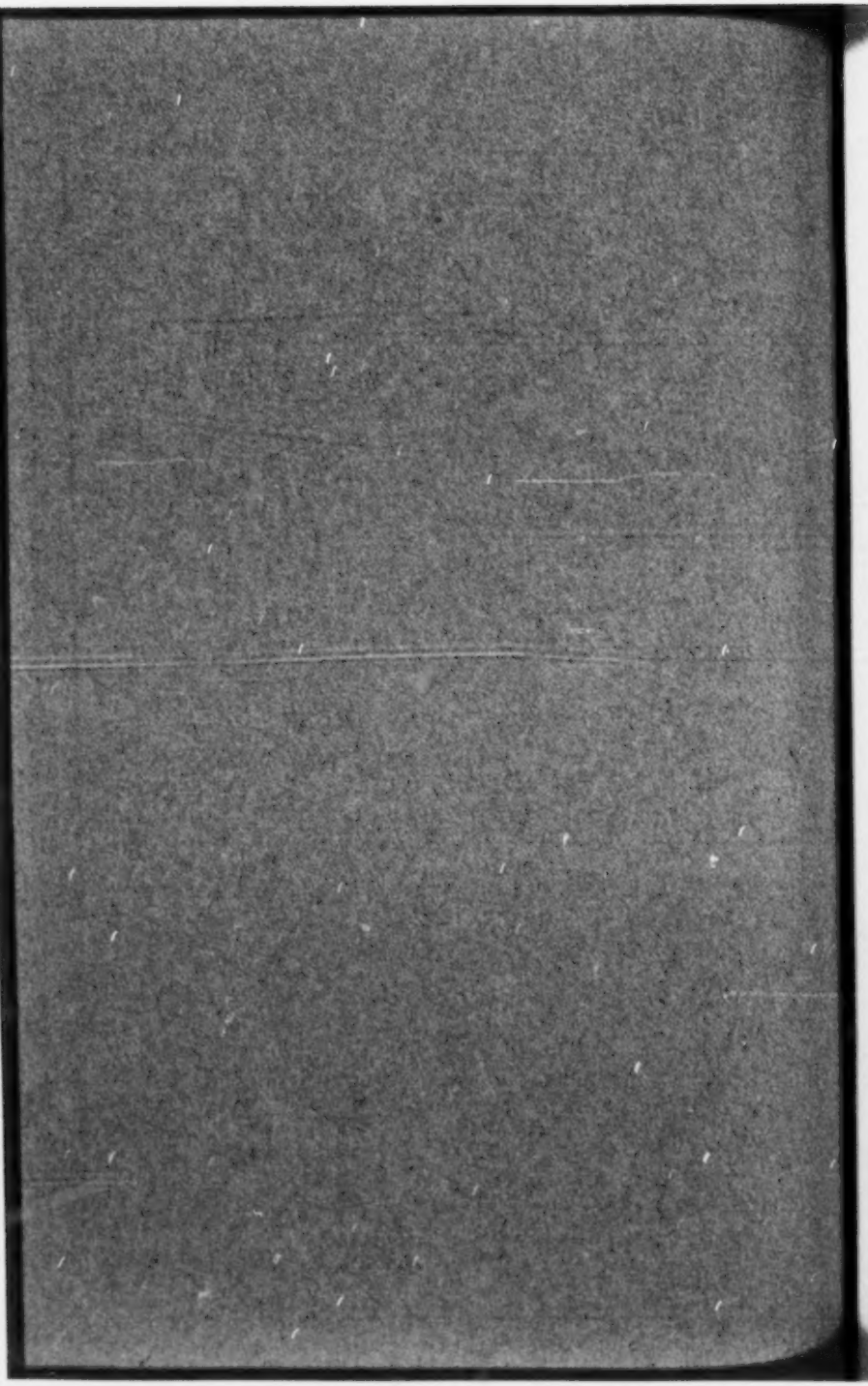
vs.

THE CITY OF CHATTANOOGA, TENNESSEE

MOTION TO DISMISS BILL

SAM E. WHITAKER,
City Attorney.

W. GREAT-HOUSE, ABILENE, TEXAS.



IN THE

Supreme Court of the United States

No. 26 ORIGINAL

STATE OF GEORGIA

VS.

THE CITY OF CHATTANOOGA, TENNESSEE

MOTION TO DISMISS BILL

Now comes the defendant, the City of Chattanooga, Tennessee, and moves the Court to dismiss the bill filed against it because:

1. The Court is without jurisdiction to entertain the bill because the original jurisdiction of this Court of suits between a State and a citizen of another State extends only to cases in which the State sues or is sued in its sovereign capacity and not to cases in which it sues or is sued as a private or quasi-public corporation, and

the bill shows on its face that the plaintiff owns the lands, which it is alleged the defendant seeks to condemn, not as a sovereign but as a private or quasi-public corporation.

2. This Court is further without jurisdiction to entertain the bill by virtue of the provisions of the Eleventh Amendment to the Constitution of the United States, which reads as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

3. This Court is further without jurisdiction to entertain the bill because the Courts of Tennessee, having jurisdiction of petitions for condemnation of all lands over which the sovereignty of the State of Tennessee extends, and the bill showing on its face that the sovereignty of the State of Tennessee extends over the lands of the plaintiff in controversy, and the jurisdiction of one of the Courts of the State of Tennessee having been invoked by the defendant, under the power delegated to it by the State of Tennessee, prior to the filing of the bill in this cause, this Court is without power to enjoin it from proceeding therein, and itself assume jurisdiction of the controversy.

4. This Court is further without jurisdiction to entertain the bill and grant the relief sought, because the bill shows on its face that the State of Tennessee granted

permission to the State of Georgia to acquire lands within the limits of its sovereignty, to be used in the operation of the Western & Atlantic Railroad, subject to the express condition that the State of Georgia should be liable to suit on the same terms that two certain railroad companies incorporated under the laws of the State of Tennessee were subject to suit, and the Courts of Tennessee, having jurisdiction of a proceeding to condemn the lands of said companies, had jurisdiction of the petition to condemn the lands of the plaintiff, and their jurisdiction having been invoked by the defendant under the power delegated to it by the State of Tennessee, prior to the filing of the bill in this cause, this Court is without power to enjoin defendant from proceeding with said suit in the State Court and itself assume jurisdiction of the controversy.

5. This Court is further without jurisdiction to entertain the bill which seeks to enjoin a proceeding in the Circuit Court for Hamilton County, Tennessee, by virtue of the provisions of Section 720 of the Revised Statutes of the United States, which reads as follows:

> The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

6. This Court is further without jurisdiction to entertain the bill and grant the relief sought because the bill does not show that the defenses set up therein to

the petition for condemnation filed by the defendant against the plaintiff cannot be fully made and adequate relief obtained in the Circuit Court for Hamilton County, Tennessee, where said petition has been filed, and this Court is therefore, without power to enjoin said suit at law.

SAM E. WHITAKER,
City Attorney.